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# REPORTS OF CASES

ADJUDGED IN THE

# SUPERIOR COURT

AND

# SUPREME COURT OF ERRORS

FROM

July, A. D. 1789, to June, A. D. 1793,

WITH A VARIETY OF CASES ANTERIOR TO THAT PERIOD, PREFACED WITH OBSERVATIONS UPON THE GOVERNMENT AND LAWS OF CONNECTICUT, TO WHICH IS SUBJOINED SUNDRY LAW POINTS ADJUDGED AND RULES OF PRACTICE ADOPTED IN THE SUPERIOR COURT.

BY JESSE ROOT,
A JUDGE OF THE SUPERIOR COURT.

1764-93

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# INTRODUCTION

## On the Principles and End of Government.

The great end of government and laws is human happiness; the rulers ought, therefore, to understand and know in what it consists; and the means of producing it.

Happiness consists primarily, in the approbation of a well-informed and enlightened understanding, and the pleasing anticipation of a final euge of well done good and faithful servant. And secondarily, in a conscious enjoyment of freedom, health, peace, and competence. The means of producing it, are those which the author of our nature hath ordained and appointed.

Man, is introduced into being in a state of infancy, both as to his body and his mind; endowed with every power and faculty, in miniature, necessary for the purposes of enjoyment and usefulness, agreeable to his nature, his station and circumstances through all the varying scenes of his existence. Milk from the breast is the proper food for the body in this feeble state; to nourish, increase and strengthen, its various organs; and as its strength and vigor increases, more solid nutriment is to be administered, and the child put to proper

exercise; thereby to acquire firmness, activity, and experience, by the application and use of its powers and faculties; and to learn the subordination of its appetites and passions to the restraints and guidance of reason. So the simple ideas, let in by the medium of the senses, is the natural and proper aliment of the infant mind; these are the materials of its growth in knowledge, on which it feeds and operates, as its reasoning faculties grow and expand, by recollecting, comparing, abstracting, compounding, reasoning and judging about them — this shows that great caution ought to be used, by those, who have the care of educating children and youth; to prevent improper ideas from being excited, and evil impressions from being made; by impure communications or vicious examples; and to train them up in the ways of knowledge and virtue in childhood; and then the voice of infallibility is; that they will not depart therefrom when they are old.

Wisdom and knowledge, or knowledge and virtue, are by the constitution of our nature, and by the appointment of the author of our being, the *sine qua non*, of individual and social happiness. These are necessary qualities to constitute the good citizen, as well, as the good man. Whatever his rank, character, occupation, or business, may be in the community; without these, although possessed of every other advantage, he will be wretched as an individual; and as a member of society will be wanting in cordiality to its true interest.

The means of communicating knowledge and virtue are instruction and example; and the means of acquiring them, are attention, study and diligence. The first of these are in the power of every government to provide; by forming proper establishments, for the diffusion of useful knowledge;

for the encouragement of the industrious and enterprising; for the correction of the refractory and dissolute; for the employment of the idle, and for the support of the poor: And those who refuse instruction, or disregard the precepts of wisdom and justice, must be restrained by force of laws, armed with proper sanctions, to prevent and restrain them from injuring others, by their fraud or violence. Diligence and industry in some honest profession or calling, is the way to health, peace, and competence, and to usefulness in society; these government should encourage and protect, as the principal source of the wealth, strength and respectability of our country.

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### The Origin of Government and Laws in Connecticut.

Our ancestors, who emigrated from England to America, were possessed of the knowledge of the laws and jurisprudence of that country; but were free from any obligations of subjection to them: The laws of England had no authority over them, to bind their persons; nor were they in any measure applicable to their condition and circumstances here: Nor was it possible they should be; for the principles of their government, as it respected the prerogatives of the crown, the estates, rights and power of the lords, and the tenure of their lands, were derived from the feudal system: The privilege of sending members to parliament, from the towns, cities, and boroughs, to compose one branch of the legislature, called the house of commons, and an exemption from taxation, only by their consent, was extorted from the kings by the barons, and is confirmed by the great charter of liberties as of his gift and grant. Their other laws were calculated for a great commercial nation. As to their criminal code, it was adapted to a people grown old in the

habits of vice, where the grossest enormities and crimes were practised. In every respect therefore their laws were inapplicable to an infant country or state; where the government was in the people; and which had virtue for its principle, and the public good for its object and end; where the tenure of their lands was free and absolute, the objects of trade few, and the commission of crimes rare.

Our ancestors therefore as a free, sovereign, and independent people, very early established a constitution of government by their own authority; which was adapted to their situation and circumstances; and enacted laws for the due and regular administration of justice; for the propagation of knowledge and virtue; for the preservation of the public peace, and for the security and defense of the state against their savage enemies. New Haven did the same with little variation in point of form.

Their common law was derived from the law of nature and of revelation; those rules and maxims of immutable truth and justice, which arise from the eternal fitness of things, which need only to be understood, to be submitted to; as they are themselves the highest authority; together with certain customs and usages, which had been universally assented to and adopted in practice, as reasonable and beneficial.

Connecticut, with the other three New England states, viz. Massachusetts, New Haven and Plymouth, early confederated together for mutual safety and defense; each still retaining its sovereignty, and the government of its own internal police.

In the 14th year of Charles the II. A. D. 1662, Connecticut being desirous of some more potent friend and ally; and proposing to herself, many other advantages, by a con-

nection with the crown of England; as a free trade with an old manufacturing country —also an extinguishment of the claim, which the crown had upon their lands in right of discovery; and her sister state, the Massachusetts having led the way, by forming a similar connection: They caused a constitution of government to be drawn up in form of a charter; and so as to include the colony of New Haven, which Mr. Winthrop their agent did, agreeable to the spirit and principles of their former government; and presented it to the king in council; of which he approved and granted, ratified and confirmed it. Whereby they obtained from the crown a confirmation and guarantee of all those rights, prerogatives and powers, which they enjoyed and exercised before as a sovereign independent government — also a grant and confirmation of the title to the lands described in the charter; to hold in free and common socage; with all the islands, waters, rivers, havens, fisheries, quarries, mines, minerals and precious stones, etc. reserving only a fifth part of the gold and silver ore which from time to time might be gotten there; in lieu of all services, duties and demands whatsoever; also the rights and immunities of natural-born subjects of the crown of England; with the privilege of a free trade to all parts of the king's dominions; and protection from his fleets and armies.

By this the general assembly, consisting of the governor and council, composed of twelve assistants, seven of whom made a quorum; and the representatives of the people, not exceeding two from each town; were invested with supreme power of legislation; also of constituting courts, with final jurisdiction, in all civil and criminal causes; of appointing judges and all other officers of government, necessary for the well ordering and governing the affairs of the colony. With this only reservation, that they should make no laws repugnant to the laws of England; this could hardly be called a restraint upon the legislating power. The people swore

allegiance to the king and his government — all commissions and legal processes issued in his majesty's name — all criminal prosecution were styled pleas of the crown.

The style of enacting statutes was as follows: Be it enacted by the governor and council and representatives in general court assembled, and by the authority of the same — Thus, although, they became connected with and subordinated to the crown of England, with the rights of subjectship, yet they were under no obligation of obedience to the government and laws of the kingdom. For first, they were the laws of the realm of England which could not extend to them who were out of it. Second, they were inapplicable to their situation and circumstances in this country. Third, neither the parliament nor the people of England had any authority over them to control their persons or bind their property, derived either from conquest, compact, or from their being represented, actually or virtually in the legislature of that country; or from any other consideration whatever.

By the late revolution in America all connection with the crown of England was broken off and dissolved; but the constitution of the state remained in all other respects, the same unaltered basis of government, in its principles, regulations and efficient powers which it ever had been from its first formation and establishment. Wherefore, the legislature of this state, upon the declaration of independence being made in congress on the 4th of July, A. D. 1776, made the following abstract and declaration of the rights and privileges of the people of this state; and passed a law for securing the same, which is as follows:—

"The people of this state being by the providence of God free and independent, have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and having from their ancestors derived, a free and

excellent constitution of government, whereby the legislature depends on the free and annual election of the people; they have the best security for the preservation of their civil and religious rights and liberties.

"And forasmuch as the free fruition of such liberties and privileges as humanity, civility and christianity call for, as is due to every man in his place and proportion, without impeachment and infringement, hath ever been and will be the tranquillity and stability of church and commonwealth; and the denial thereof, the disturbance, if not the ruin of both:

"Be it enacted and declared by, etc. That the ancient form of civil government contained in the charter from Charles the II. king of England, and adopted by the people of this state, shall be and remain the civil constitution of this state, under the sole authority of the people thereof, independent of any king or prince whatever. And that this republic is and shall forever be and remain, a free, sovereign, and independent state, by the name of the state of Connecticut."

Nothing more was necessary than to declare that we owed and would bear no further allegiance to the king of Great Britain, nor would exercise government in his name nor under his authority — that the ancient form of civil government adopted by the people, shall be and remain the civil constitution of this state, under the sole authority of the people, independent of any king or prince.

This constitution of our government, framed by the wisdom of our ancestors about 160 years ago, adapted to their condition and circumstances, was so constructed as to enable the legislature to accommodate laws to the exigencies of the state, through all the changes it hath undergone; and

is nearly coeval with our existence as a community; and analogous to the spirit of which all our laws have been made, from time to time, as cases occurred and the good of the public required.— And can it be said with the least color of truth, that the laws of the state are not adequate to all the purposes of government and of justice.

We need only compare the laws of England with the laws of Connecticut, to be at once convinced of the difference which pervades their whole system. This is manifest in the spirit and principles of the laws, the objects, and in the rules themselves; with respect to the tenure of lands, descents, and who are heirs, and the settlement of insolvent estates, and of other estates testate and intestate, the probate of wills, registering of deeds; the arrangement and jurisdiction of our courts, the forms of civil processes, and the mode of trial, the appointing and returning jurors; and with respect to the settlement and support of the poor, the appointment and regulation of sheriffs, gaols and gaolers, the orderly celebration of marriages and granting of divorces; the means of propagating knowledge, and with respect to the punishments annexed to crimes; and in innumerable other instances too tedious to mention; which every lawyer is acquainted with. May the citizens of Connecticut, glory in this system of government and jurisprudence; which, at first, was the product of wisdom, is perfected and matured by long experience; which has carried us safe through many a storm, withstood every attack, for more than a century and a half, is grown venerable by age and the wisdom of its regulations, and the rich profusion of blessings which it confers, as the noblest birthright of themselves and their children; and the highest interest and honor of the state as an independent member of a great nation; the rising empire of America.

These rights and liberties are our own; not holden by the gift of a despot; our government and our rulers are from amongst ourselves; chosen by the free uninfluenced suffrages of enlightened freemen; not to oppress and devour, but to protect, feed, and bless the people, with the benign and energetic influence of their power, (as ministers of God for good to them.) This shows the ignorance of those who are clamorous for a new constitution, and the mistake of those who suppose that the rules of the common law of England are the common law of Connecticut, until altered by a statute.

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### On the Common Law of Connecticut.

These questions are frequently asked, What is the common law of America? Have we any common law in Connecticut? I know not how I can better resolve these questions than by answering another, (viz.) What is common law? And first,

Common law is the perfection of reason, arising from the nature of God, of man, and of things, and from their relations, dependencies, and connections: It is universal and extends to all men, and to all combinations of men, in every possible situation; and embraces all cases and questions that can possibly arise; it is in itself perfect, clear and certain; it is immutable, and cannot be changed or altered, without altering the nature and relation of things; it is superior to all other laws and regulations, by it they are corrected and controlled; all positive laws are to be construed by it, and wherein they are opposed to it, they are void. It is immemorial, no memory runneth to the contrary of it; it is coexistent with the nature of man, and commensurate with his being; it is most energetic and coercive; for every one who violates its maxims and precepts are sure of feeling the weight of its sanctions.

Nor may we say, who will ascend into heaven to bring it down, or descend into the depths to bring it up, or traverse the Atlantic to import it; it is near us, it is within us, written upon the table of our hearts, in lively and indelible characters; by it we are constantly admonished and reproved, and by it we shall finally be judged. It is visible in the volume of nature, in all the works and ways of God; its sound is gone forth into all the earth, and there is no people or nation so barbarous, where its language is not understood.

The dignity of its original, the sublimity of its principles, the purity, excellency and perpetuity of its precepts, are most clearly made known and delineated in the book of divine revelation; heaven and earth may pass away and all the systems and works of man sink into oblivion; but not a jot or tittle of this law shall ever fail.

By this we are taught the dignity, the character, the rights and duties of man, his rank and station here and his relation to futurity; that he hath a property in himself, his powers and faculties; in whatever is produced by the application of them; that he is a free agent subject to the control of none, in his opinions and actions but to his God and the laws, to which he is amenable. This teaches us, so to use our own as not to injure the rights of others: This enables us, to explain the laws, construe contracts and agreements, to distinguish injuries, to determine their degree and the reparation in damages which justice requires. This designates crimes, discovers their aggravations and ill-tendency; and measures out the punishments proper and necessary for restraint and example: This defines the obligations and duties between husbands and wives, parents and children, brothers and sisters, between the rulers and the people, and the people or citizens towards each other: This is the Magna Charta of all our natural and religious rights and liberties, and the only solid basis of our civil constitution and privileges — in short, it supports, pervades and enlightens all the ways of

man, to the noblest ends by the happiest means, when and wherever its precepts and instructions are observed and followed — the usages and customs of men and the decisions of the courts of justice serve to declare and illustrate the principles of this law; but the law exists the same — nor is this a matter of speculative reasoning merely; but of knowledge and feeling; we know that we have a property in our persons, in our powers and faculties, and in the fruits and effects of our industry, we know that we have a right to think and believe as we choose, to plan and pursue our own affairs and concerns; whatever we judge to be for our advantage, our interest or happiness, provided we do not interfere with any principle of truth or of reason and justice. We know the value of a good name, and the interest we have in it, we know that every man's peace and happiness is his own; nay more, when our persons are assaulted, our lives attacked, our liberties infringed, our reputation scandalized, or our property ravaged from us or spoiled; we feel the injury that is done to us, and by an irrepressible impulse of nature, resent the violation of our rights, and call upon the powerful arm of justice to administer redress. We also know that other men have the same rights, the same sensibility of injuries, when their rights are violated — this law is therefore evidenced both by the knowledge and the feelings of men. These ought to be the governing principles with all legislators in making of laws, with all judges in construing and executing the laws, and with all citizens in observing and obeying them.

Secondly, another branch of common law is derived from certain usages and customs, universally assented to and adopted in practice by the citizens at large, or by particular classes of men, as the farmers, the merchants, etc. as applicable to their particular business, and to all others of the same description, which are reasonable and beneficial.

These customs or regulations, when thus assented to and adopted in practice, have an influence upon the course of trade and business, and are necessary to be understood and applied in the construction of transactions had and contracts entered into with reference to them: To this end the courts of justice take notice of them as rules of right, and as having the force of laws formed and adopted under the authority of the people.

That these customs and usages must have existed immemorially, and have been compulsory, in order to their being recognized to be law; seems to involve some degree of absurdity — that is, they must have the compulsory force of laws, before they can be recognized to be laws, when they can have no compulsory force till the powers of government have communicated it to them by declaring them to be laws: That so long as any one living can remember when they began to exist they can be of no force or validity whatever, however universally they may be assented to and adopted in practice; but as soon as this is forgotten and no one remembers their beginning, then and not till then they become a law; this may be necessary in arbitrary governments, but in a free government like ours, I should suppose, the better reason to be this:

That as statutes are positive laws enacted by the authority of the legislature, which consists of the representatives of the people, being duly promulgated, are binding upon all, as all are considered as consenting to them by their representatives: So these unwritten customs and regulations which are reasonable and beneficial, and which have the sanction of universal consent and adoption in practice, amongst the citizens at large or particular classes of them, have the force of laws under the authority of the people, and the courts of justice will recognize and declare them to be such, and to be obligatory upon the citizens as necessary rules of construction and of justice. The reasonableness and utility of their operation, and the universality of their

adoption, are the better evidence of their existence and of their having the general consent and approbation, than the circumstance of its being forgotten when they began to exist.

Thirdly, another important source of common law is, the adjudications of the courts of justice and the rules of practice adopted in them. These have been learned by practice only, as we have no treatises upon the subject, and but one small volume of reports containing a period of about two years only, and a treatise lately wrote by Mr. Swift, containing a commentary on the government and laws of this state. We learn from history, the constitutions of government and the laws of foreign countries, the adjudications and rules of practice adopted in their courts of justice; but this will not give us the knowledge of our own, and although we may seem to have borrowed from them, yet ours is essentially different from all; in that, it is highly improved and ameliorated in its principles and regulations, and simplified in its forms, is adapted to the state of our country, and to the genius of the people, and calculated in an eminent manner to improve the mind by the diffusion of knowledge, and to give effectual security and protection to the persons, rights, liberties and properties of the citizens; and is clothed with an energy, derived from a source, and rendered efficacious by a power, unknown in foreign governments, (viz.) the attachment of the citizens who rejoice in being ruled and governed by its laws, for the blessings it confers. Let us, Americans then, duly appreciate our own government, laws and manners, and be what we profess, an independent nation; and not plume ourselves upon being humble imitators of foreigners, at home and in our own country; but let our manners in all respects be characteristic of the spirit and principles of our independence.

I trust by this time the reader has anticipated in his own mind the answer to the questions, what is the common law of America? and have we any common law in the state of

Connecticut? These principles, as applied to the situation and genius of the people, the spirit of our government and laws, the tenure of our lands, and the vast variety of objects, civil and military, ecclesiastical and commercial, in our own state have been exemplified in practice, defined, explained and established by the decisions of the courts, in innumerable instances, although reports of but few of them have been published. To these I think we ought to resort, and not to foreign systems, to lay a foundation, to establish a character upon, and to rear a system of jurisprudence purely American, without any marks of servility to foreign powers or states; at the same time leave ourselves open to derive instruction, and improvement from the observations, discoveries, and experience of the literati, in all countries and nations, respecting jurisprudence and other useful arts and sciences. And indeed, a great part of our legal ideas were originally derived from the laws of England and the civil law, which being duly arranged, have been incorporated into our own system, and adapted to our own situation and circumstances.

It is of great importance to a country or state that the laws which regulate the intercourse among the citizens, determine property, construe and enforce contracts, define crimes and their punishments, and provide remedies for the recovery of rights, and for the redress of wrongs, should be just in principle; clear, concise, and unequivocal in expression; uniform, permanent, and consistent in their meaning and application; and energetic and coercive in their operation; extending to and embracing every possible case. This would enable the courts of law to do justice in all cases, and would supersede the necessity of the courts of chancery; and indeed are not the courts of chancery in this state borrowed from a foreign jurisdiction, which grew out of the ignorance and barbarism of the law judges at a certain period in that country, from whence borrowed:— And would it not be as safe for the people, to invest the courts of law with

the power of deciding all questions and of giving relief in all cases according to the rules established in chancery, as it is to trust those same judges as chancellors to do it; those rules might be considered as a part of the law, and the remedy be made much more concise and effectual.

Further, would not this remedy great inconveniences and save much expense to suitors, who are frequently turned round at law, to seek a remedy in chancery; and as often turned round in chancery, because they have an adequate remedy at law; these are serious evils and ought not to be permitted to exist in the jurisprudence of a country, famed for liberty and justice; and which can be remedied, only by the interposition of the legislature.

Statutes are positive laws framed by the wisdom, and enacted by the authority of the legislature, and like the most perfect system of human composition, however well intended and wisely devised, would often, if literally pursued, fail of the good ends proposed, through some ambiguity in the expressions, or some defect in the remedy provided, unless construed and corrected by reason and equity, agreeably to the intent of the legislature, according to the following rules: 1st. By considering what the mischief was which the statute designed to remedy. 2d. The remedy the statute hath or meant to have provided. 3d. The true reason of the remedy. And it is the province of the courts of law to explain and declare what both the written and unwritten laws are, and from their decisions we are to learn the law and its determinate meaning.

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## On the Statute Laws of Connecticut, securing and confirming the Rights of the Citizens.

Government and laws, have been erroneously considered, as originating in the prince or potentate, and the liberties

and privileges enjoyed by their subjects as flowing from their free benignity and good will; for this cause the subjects exist only for their king; their lives, liberty and property are all devoted to his honor, pleasure and aggrandizement; whereas, the truth, in fact is, that civil government is ordained of God, for the good of the people, and the Constitution they adopt, and the persons they appoint to bear rule over them, to make and to execute the laws, the Almighty recognizes to be his ministers, acting under his authority, for the advancement of order, peace and happiness in society, by protecting its members in the quiet enjoyment of their natural, civil and religious rights and liberties. It is the office and duty of the supreme power of a state, to enact and in some proper manner promulgate to its citizens and subjects the will of the state, which is the law respecting their rights, and their duties, that they may know how to preserve and enjoy the former, and comply with and perform the latter; also, the punishments annexed to the various infractions of the public will, thus declared and comprised in the laws.

In republican governments, justice ought to be the principle, the public good the object, and reason and virtue the life and spirit of their laws. Statutes are made either in affirmance of natural rights and duties and declarative of them, or are positive regulations for political reasons, respecting certain matters and things, in themselves indifferent.

The great end of civil government is social happiness; to induce us to respect the rights, interests, and feelings of others as our own, conformable to that great command in the law, which is the foundation of all relative duties from man to man; to love our neighbor as ourselves, and to do to all as we would they should do to us; knowing that the rights and enjoyments of others are the same to them as ours are to us, and that all men are brethren, have one father, who is God, created in his image, and connected in one great family under the government of their illustrious head the

Prince of Peace and of the potentates and powers of the earth. A practice universally adopted agreeable to these principles and rules, would, without the intervention of penal laws, render the security of individuals perfect, and advance the harmony, beauty, and happiness of society, beyond the power of language to describe.

The legislatures of Connecticut, sensible of the importance of these objects, have calculated their laws in direct subserviency thereto; and to compel their refractory citizens to do through fear of punishment what they ought to do from principles of obedience. The first law in the book of statutes in order of time and in point of importance, is; "that no man's life shall be taken away: No man's honor or good name shall be stained: No man's person shall be arrested, restrained, banished, dismembered, nor any ways punished: No man shall be deprived of his wife or children: No man's goods or estate shall be taken away from him, or any ways endamaged under the color of law or countenance of authority, unless clearly warranted by the laws of the state."

These great essential rights, are derived from a source above all that is human; are holden by a tenure superior to what any power on earth can create or give; it is the Magna Charta of the Deity, the supreme ruler and governor, which grants and confirms these rights to man; they are therefore justly called natural rights, and the violation of them a crime against the law of nature, and what in law language is denominated, *malum in se.*

The legislature has laid this as the foundation on which to rear a system of laws and jurisprudence calculated to secure and advance in the best possible manner the good of individuals, and the public peace and safety.

### Statute on Family Education.

And solicitous by every possible means in their power, to secure their object, and impressed with an idea of the importance of the early culture of the human mind, and that the establishment of good principles and habits in youth, are infinitely more influential to form the good citizen than mulctuary laws; have aimed to give the most effectual aid to virtue, and by a law entitled an act for the education of children, have required that all parents and masters of children, shall teach or cause to be taught and instructed all children under their care and government, to read the English language well, to know the principles of religion and virtue, and the laws of the state against crimes; and a penalty is to be inflicted for their neglect and the selectmen and grand jurors in the respective towns are enjoined to prosecute all breaches of this law.

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### On Schools, etc.

And by an act, entitled, an act for appointing, encouraging and supporting schools, it is enacted "that every town within this state, wherein there is but one ecclesiastical society, and wherein there are seventy householders or families or upwards; and every ecclesiastical society constituted, or that shall be constituted by the general assembly, wherein there shall be seventy householders or families or upwards, shall be provided with and shall keep and maintain one good and sufficient school, for the teaching and instructing of youth and children to read and write, at least eleven months in each year, which school shall be steadily supplied with and kept by a master sufficiently and suitably qualified for that service: And every town and society, that hath not the number of seventy householders or families, shall be

provided with and maintain a school as aforesaid six months in each year.

"And there shall be a grammar school kept and constantly maintained in all the county towns, that are or shall be made in this state, to be steadily kept, by some discreet person, of good conversation, and well acquainted with the learned languages, especially the Greek and Latin."

And certain funds are provided for the support of said schools; and where the funds shall be deficient the inhabitants of the towns or societies shall by a tax raise one-half of such deficiency, and the other half shall be paid by the parents and masters of the children; and a penalty is laid upon the towns and societies who shall neglect their duty enjoined by this act.

And by a late act all the moneys arising upon the sale of the western lands, are appropriated to this object; that is to say, the annual interest is to be applied to the support of schools in the several school societies or districts; this is an ample addition to the former funds. These establishments are founded not only upon principles of reason and benevolence to others, but of justice and good will to ourselves — for the children of the poor, as well as the rich, are born with capacities for instruction and improvement in knowledge and in virtue, and to acquire and enjoy the rights and privileges of citizens — and happy must be the condition of that people, whose citizens are all well informed, well principled, and virtuously inclined.

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### On the Liberal Arts and Sciences.

Ignorance and want of proper education, are fruitful sources of evil to mankind. Atheism, infidelity, blasphemy, treason, murder, and the whole catalogue of black enormities

and crimes which degrade human nature, disturb society, and would constitute a hell upon earth, are the unfruitful works of ignorance and darkness: The hierarchy of the pope; the throne of tyranny and despotism, are supported by it: It converts liberty, the choicest of blessings, into licentiousness and anarchy, the most intolerable of evils: It is an implacable foe to virtue and good order, and the hot bed of sedition, rebellion, and of almost every vice: It dethrones reason of its empire, and gives up the reins to every malignant and vicious lust and passion, and to the wild follies of a fanatic delusion: It renders a man a pest to society, a disgrace to human nature, a burden to himself, and a sure prey to eventual perdition. Whereas,

True knowledge in the soul is like light and heat in the sun. It awakens, enlightens, and invigorates every noble and social passion: It sets in motion all the tender and benevolent sensibilities of the heart. The man of knowledge and virtue is a light in himself and a lamp to all around him: The wisdom and rectitude of his deportment exalts the dignity of his nature, and doth honor to his Maker.

Deeply impressed with these ideas, our ancestors early not only made provision that all the children of the people should be properly educated and instructed, as hath been stated, but raised their ideas to higher objects and nobler designs;— the instruction of youth in the liberal arts and sciences. They considered the founding of a college, or seminary of literature of the highest consequence to a republic, from the beneficial influence it would have upon its most important concerns; that it would be a fountain of knowledge from whence streams would flow to every part, and spread useful instruction, amongst all the interesting transactions of life; from which the church and the state would be furnished with men of science and wisdom for their rulers and teachers, and the schools in the societies and districts with well-accomplished masters and instructors, and

the learned professions be filled with men of principles and knowledge in their respective departments, who would do honor to themselves, be a blessing to mankind, and an ornament to their profession.

In A. D. 1700, the general assembly of the then colony of Connecticut, upon the application of a number of characters eminent for their patriotism and piety from among the clergy, laid the foundation of Yale College; granted a charter of incorporation to eleven trustees or fellows, with ample privileges, and endowed it with considerable funds. This infant seminary the government took into its protection and patronage; and as the ability of the colony and state increased and the exigencies of the college required; for erecting of new buildings or repairing of old, or for establishing necessary and useful professorships: They have from time to time been adding to the funds; and since the American revolution, the legislature, with the concurrence of the corporation, have enacted that the governor, lieutenant-governor and the six senior assistants in the council of the state, for the time being, shall be of the corporation; and have also made large additions to the funds. Thus the wisdom and counsel as well as the interest of both the civil and ecclesiastical departments in the state, are become united in advancing the prosperity of that seminary for the general welfare.

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### On the Worship of the Deity.

The legislators like wise and faithful rulers, having by the means of instruction, which they had provided, laid a foundation to prepare the rational mind, for the reception of the sublime and important lessons of divine truth; considered all they had done as incomplete, until they had crowned the whole, by making provision, for this also; which alone

can lead the mind to interminable peace and joy: And contemplating man as a rational, free, and immortal being, accountable for his conduct here; and that all men, in a land of light, like this, do believe in the existence of God, the first cause of all things, and supreme governor of the world, who will reward virtue and punish vice: And that he is to be worshiped and adored by all his intelligent creatures; and that the laws and maxims of his government, which are prescribed to guide men to perfection and immortal felicity, are calculated in the wisest and best manner to make them good citizens here; early made provision for the public worship of the Deity; by enacting laws, requiring the several towns and ecclesiastical societies, to erect and build at their own expense, suitable and convenient houses and churches for that purpose; and that they should be furnished with an ordained minister of the gospel, to teach and inculcate the important duties of the Christian religion; whom they should support and maintain.

And although the law requires this, yet it leaves it to every man's choice, to worship where and in the manner, that is most agreeable to his conscience; and excuses him from paying for the support of the public worship, in any other society than that with whom he hath joined himself, and doth attend, and pay.

Although this enjoins upon all to support the public worship of the Deity, yet it leaves to every man, free liberty of conscience; for no man can plead as an excuse, for not worshiping his Maker, in some way or other, that it is against his conscience. These regulations are founded in the reason and fitness of things, as well as the wisest policy; for if there is reason and propriety in anything in nature, it is reasonable and fit that an intelligent creature should worship his Creator. Besides, the Christian religion contains the noblest principles for human conduct, and the most pure and perfect rules of life, which are enforced with solemn and awful sanctions, drawn from the considerations of futurity.

It also exhibits innumerable striking examples of the most disinterested and sublime virtues.

Further, the history of the world from the beginning, furnish incontestible proofs of this solemn truth — That among all nations where the worship of Deity has been neglected and contemned, destruction and ruin hath sooner or later overtaken them; while those who have preserved and maintained his worship in purity and truth, have not only been preserved, but blessed and prospered.

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### On the Observation of the Sabbath.

The legislature further considering that the Creator and sovereign proprietor of the earth and of its fruits; of man and of his time and service, when he had finished his works of creation, put man into possession and made him lord of all here below, reserving the fruit of one tree only of all the fruits of the earth, and one day in seven of all the days in the week, to be devoted and employed in his immediate worship and service; as an acknowledgment for the rest, as a test of his loyalty and obedience, and as a constant remembrancer from whom and by what tenure, he held all the inestimable blessings of time: that the withholding of these services and profaning the Sabbath by the unnecessary pursuit of secular employments and diversions; is direct rebellion against the supreme Lord, an impious denial of his right, and refusal to hold under him, and has the same unhappy effect upon the temper, state and morals of an individual or a nation, as eating of the forbidden fruit had upon our first parents.

Besides, they viewed it as an institution founded not only in the highest authority, but in the greatest wisdom and good policy. One day in seven is little enough to be employed in

the momentous concerns of immortality; it is little enough for rest and relaxation from the busy scenes of life and worldly pursuits; it is the means of acquiring knowledge of the most interesting truths, and of establishing us in the habits of virtue, order and decency, which are not to be found where the Sabbath is disregarded and profaned; and that the profanation of the Sabbath is noted in the scriptures of truth, and in the history of mankind, as an infallible mark of great degeneracy in principles and manners, and a certain prelude to impending destruction.

That it is a necessary and convenient mean in the computation of time — We calculate by hours to the number of twenty-four, and then by days to the number seven, then by weeks till we get to a month, then by months up to a year, etc. The days, months, and years are marked out by the revolutions of the heavenly bodies; but a week consisting of seven days was formed in this wise: The Almighty was six days in the works of creation; on the seventh day he rested or ceased working, and contemplated the things which he had made; and sanctified the seventh day and consecrated it to be observed as a day of sacred rest, in commemoration of the works of creation, which formed a grand epoch in the beginning of time.

Redemption was completed in the morning of the first day of the week, which formed a second grand epoch of the highest importance to mankind; and we cannot commemorate the second without being necessarily led back to the first, and to the sad apostacy of man. Thus the great events which were commemorated on the seventh day, since the Christian era, are necessarily implied and involved in those of the first: The world created out of nothing and ransomed from ruin by the Saviour, are the illustrious events which offer for our contemplation and commemoration on the first day of the week.

The legislature therefore by one of their first laws, enjoined upon their citizens the observance of the Sabbath; forbidding all secular employments and recreations, to be pursued on the Sabbath or Lord's day, except works of necessity and mercy; also made it highly penal for any to give disturbance to others who observe the day.

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### On Public Opinion.

To these regulations our ancestors, added the weight of public opinion, those who honored the great governor of the world, his institutions and laws, they honored with their confidence; and great force and influence is given to the laws by this; every individual feels its power and is unable to resist it. In a country where vice and meanness, is held in detestation and abhorrence, and all who transgress the rules of decency and virtue, are contemned and despised, by their fellow citizens, however great their accomplishments may be in other respects; crimes will be few. In all free and enlightened states, shame and disgrace forms the most poignant part of any punishment: An accusing conscience within, backed with a disapproving and frowning public without; constitutes the most awful tribunal in nature, short of the last great day of final decision and retribution.

Yet knowing, that notwithstanding all these noble and salutary provisions, for the advancement of knowledge, virtue and peace; there would be some who would refuse instruction, or disregard its councils and precepts, and violate the rights of others; that other and further laws were necessary to be made, armed with proper sanctions, to restrain and punish the lawless and disobedient, and to guard the innocent and the virtuous. For this end were the laws or-

dained and enacted against treason, murder, manslaughter, rape, adultery, riots, routs, breaches of the peace, and slander: Also against arson, burglary, robbery, theft, forgery, perjury, and other misdemeanors, and trespasses against the person or property of individuals.

Sensible also, that it was not sufficient that the laws restrained and punished crimes committed against the public peace, and the rights of individuals, only, but that all practices against the laws of religion and good morals, are destructive to the public weal; they provided laws for the punishment of blasphemy, beastiality, profanity, lewdness, drunkenness, and other debaucheries, which tend to corrupt good morals.

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### On Marriage.

It is necessary and important to the public that the intercourse between the sexes should be regulated by law. Marriage was instituted by God between our first parents in the state of innocency; it results from the nature of man, and from the end and purposes of his creation: For, male and female created he them, and out of the body of the male was the female formed — and when the Lord God presented to Adam this perfecting stroke of creation, this beautiful image of himself, in ecstacy! he says, this production, bone of my bone, and flesh of my flesh, shall be called female or woman. And by the attracting influence of her graceful mien, her celestial beauty, and the charms of innocency that beamed from her countenance and awakened every social passion, and set in motion all the tender sensibilities of his soul, toward his second self, and their future progeny, which he surveyed in prospect; he felt the irresistible impulse of nature, attaching and uniting him to her in the indissoluble bands of per-

petual friendship; therefore, he says, by the inspiration of his Maker, shall a man leave his father and his mother and cleave unto his wife and they shall be one flesh.

That one man should be joined to one woman in a constant society of cohabiting together, is agreeable to the order of nature — is necessary for the propagation of the species, and for the preservation and education of their offspring; and to render clear and certain the right of succession.

The laws of the state forbid persons to marry each other, who are within certain degrees of kindred, under severe pains and penalties. It forbids all persons to be joined in marriage until their purpose of marrying has been regularly published.

And it ordains that no person, except a magistrate or justice of the peace, within his own county or jurisdiction, or an ordained minister, within the county wherein he dwells, and only during the time he continues settled in the work of the ministry; shall join any persons together in marriage — nor shall they, unless published as aforesaid, and consent of parents or guardians had, if such there are, on pain of forfeiting £20.

And every person who shall marry a second time, his or her former husband or wife being alive and not divorced, shall be punished as in case of adultery. And the certificate of the magistrate, justice or minister who married them, is evidence of the marriage, although other evidence may be received; and marriages are to be recorded in the records of the town where the parties dwell, and severe punishments are to be inflicted for the crime of adultery.

Divorces are granted in four cases, (viz.) for adultery, fraudulent contract, willful desertion for three years with total neglect of duty, and seven years absence without being heard of. And the Superior Court are authorized to allow

and assign to the wife, if the innocent party, so much of the husband's estate as they shall judge to be right and just, not exceeding one-third part.

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### On Supporting the Poor.

The poor and indigent in all countries, call not only for private charity, but for support and assistance from the government, and to give scope to the exercise of benevolence, the most noble and godlike virtue; for God taketh the poor under his care, he heareth them when they cry; and the highest character given of any ruler on earth is, that he judgeth the people in righteousness, and the poor with judgment; that he delivereth the needy when they cry, and the poor that hath no helper; that he dealeth bread to the hungry, and delivereth him that is ready to perish.

It is the duty of every government to protect and to provide for the poor; the laws of the state therefore humanely enact and ordain, "that every person who shall become poor and impotent, unable to provide for him or herself, and hath no estate, shall be taken care of and provided for, by such of his or her relations as stand in the line and degree of father or mother, grandfather or grandmother, children or grandchildren, if they are of sufficient ability to do it."

It further ordains that every town shall take care of, provide for and maintain, its own poor. And the law points out particularly, how a right of settlement is acquired in a town, and the poor of each town are to be provided for by the selectmen, at the charge of the town; except where some person is by law bound to support them. Citizens of other states falling into want in any town in this state, may be sent by a constable to where they belong, or be provided for by

the selectmen, at the expense of the town in the first instance, to be reimbursed by the person or by the relations, within certain degrees of kindred, if of ability, otherways, by the town, except where warning to depart was given, to the person within three months, in that case the charge is paid by the state. Foreigners who have no settlement in any town in the United States, falling into want, are provided for by the selectmen of the town, and the expense is to be allowed by the governor and council, and paid out of the treasury of the state.

A settlement in a town is gained in various ways. Children born in any place are settled where their parents are — and a bastard is settled with the mother. A foreigner who comes and resides in any town gains a settlement by being admitted an inhabitant by a vote of the town, or by consent of the civil authority and selectmen, or by executing some public office. Citizens of other states in the Union, gain a settlement in the same ways as foreigners do, and also by owning a real estate in fee, in their own right, of the value of $334. Inhabitants of one town in this state gain a settlement in another by the same ways that foreigners do, and also by owning a real estate in their own right in fee, of the value of $100; or by residing for the term of six years in a town without being chargeable. All rogues, vagabonds, sturdy beggars, and all lewd, idle, dissolute and disorderly persons, are to be taken up by the justices, and sent to the workhouse, and there to be kept to labor.

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### On Liberty.

Liberty is the crowning excellency of man; freely to choose and practice, that which is just, wise and good, and to hate and avoid that which is unjust, unreasonable and evil, is the foundation of virtue, and raises the human character to

a near resemblance to the author of all perfection; on the contrary, freely to choose and practice evil, and to refuse and counteract that which is just, right and good, constitutes the deformity, malignity, and ill desert of vice; for on freedom of choosing, depends the merit or demerit of every action.

To deprive a person of liberty, at once depresses his spirits, enervates the springs of industry and noble exertions, and ought never to be permitted in a state, but for crimes. It is taking away a natural right by civil usurpation, and depriving the state of a citizen, every one of whom ought to be at liberty to serve the public; it is a violation of those equal rights which all men are entitled to. By equal rights cannot be understood that all men are to be of equal age, equally wise and learned, and equally rich and honorable; but that every man is equally entitled to enjoy what is his own, whether natural or acquired, and however small, as any other hath to enjoy what is his; and that the same protection and security be given to one as another. This is the equality which reason and the law claims to have extended to all.

The introduction of slavery into this state from the coast of Africa, was at first, from pecuniary motives, without adverting to the principle or policy of the measure. But the legislature has long since seen the mischief, and have been providing laws to counteract and remedy it, as fast as is consistent with safety to the state. And for that purpose in A. D. 1774, they passed a law that no person thereafter, should bring or import into this state, any Indian, negro or mulatto slave from any place whatever, by land or water, to be left, disposed of, or sold; nor should any person purchase any such slave knowing him to be imported as aforesaid, on pain of forfeiting and paying £100 for each slave, so imported or purchased.

And not long after it was further ordained, that all children born of Indian, negro or mulatto parents, after the 1st

day of March, A. D. 1784, should be free at the age of twenty-five years.*

And in A. D. 1788, it was further provided by law, that no citizen of this State, should in any way or manner, directly or indirectly, buy or sell, or receive on board his or her vessel, with intent to be transported or imported into this state, any of the inhabitants of any country in Africa, as slaves or servants for term of years, on pain of forfeiting $167 for every person so received on board; and $1,667 for every vessel employed as aforesaid: And every insurance upon any vessel fitted out for the intent and employed in the business aforesaid, or upon any slaves or servants shipped on board as aforesaid, should be void.

And that if any person shall kidnap, decoy, or forcibly carry out of this state, any free negro, Indian or mulatto, or any that are entitled to freedom at the age of twenty-five years, being inhabitants and resident within this state, and be thereof convicted, shall forfeit and pay $334 for each of said persons so kidnapped, etc. one-half to the treasury of this state and the other half to the prosecutor: And the court before whom the conviction is had, shall give such a sum in damages as they shall judge to be reasonable to be recovered by the prosecutor, who is to give bond with surety to pay it over for the benefit of the party injured, or his family.

And that every owner or master of a vessel clearing out for the coast of Africa, or that shall be suspected of being for the slave trade, such suspicion being declared to the naval officer, by some of the citizens on oath, shall give a bond with surety to the treasurer of the state in the sum of £1,000; that none of the natives of Africa, or of any other foreign country, shall be taken on board said ship or vessel during her voyage, with intent to be transported as slaves to any part of the world.

* It is since enacted that all negro children, etc., born after the 1st of August, A. D. 1797, shall be free at the age of twenty-one.

And every owner of any Indian, negro or mulatto child born after the 1st of March, A. D. 1784, shall deliver to the town clerk, within six months after the birth, his own name, the name, sex and time of the birth of the child, on oath, or forfeit for his neglect $7 for every month, half to the prosecutor and half to the poor.

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### On Highways and Bridges.

Public highways and roads are of the first necessity and importance; and in an inland country, like ours, they ought to be laid in the most convenient places to accommodate public traveling; and to be kept in good repair.

This state by a law entitled, an act relating to bridges, etc. have ordained, that the inhabitants of the several towns in the state, shall make, build and keep and maintain in good and sufficient repair, all needful highways and bridges within their respective townships.

The power of superintending and laying out new highways and roads, and of assessing the damages done to private property thereby, is vested in the County Courts in the respective counties; and the town through which such new highways are laid, are to pay the damages; and every town is responsible in double damages to any person or persons who suffers any injury, through any default or deficiency in not keeping in good repair their roads and bridges.

And where any life is lost in passing over any defective road or bridge in any town, after warning has been given in writing, under the hand of two witnesses, to any of the selectmen of said town, of said defect, the town shall pay a fine of

$334 to the parents, husband, wife, children or next of kin to the deceased.

The general assembly has lately turned their attention to the laying out and straightening the great public roads; and have established turnpikes in various parts, from which much benefit to the public traveling may be expected.

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### On the Qualification of Electors and Jurors.

As the government is elective, the laws as was necessary have defined and ascertained the qualifications requisite to be a freeman or an elector; to vote in the choice of the rulers and representatives to the state and United States legislatures. Also the qualifications requisite to be a voter in town and society meetings.

And also the qualification of jurors, who are to serve in the trial of causes before the respective courts; and how they shall be appointed, drawn, and returned.

The law also hath provided regulations for the discipline and government of the militia, conformable to the laws of the United States, and of the marine, so far as particular states have jurisdiction in those matters.

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### On the Jurisdiction of Courts.

The general assembly consisting of two houses or branches, the governor, lieutenant-governor and assistants composing

one, called the governor and council; and the representatives from the several towns composing the other, called the house of representatives, constitutes the supreme legislature of the state.

The governor, lieutenant-governor and council, are the Supreme Court of Errors, to whom writs of error lie from the judgments of the Superior Court.

The Superior Court hath jurisdiction over the whole state, to whom writs of error lie from the judgments at law and decrees in chancery of the County Courts, and of the justices of the peace.

It hath appellate jurisdiction of all causes of a civil nature, where the title of land is in question, and where the debt damage or other matter in dispute exceeds the value of $70; except actions upon bonds and notes for money or bills of credit only, vouched by two witnesses.

It hath exclusive jurisdiction of all pleas of a criminal nature, that relate to life, limb or banishment, and other high crimes and misdemeanors; and of divorce and adultery; and it hath also jurisdiction of all crimes punishable with imprisonment in Newgate prison.

It hath jurisdiction of all suits in chancery wherein the value of the matter or thing in demand exceeds the sum of $335; and it exercises the power of issuing writs of *habeas corpus*, *mandamus*, *certiorari*, etc. when necessary for the prevention of injury and the advancement of justice.

The County Courts have original jurisdiction of all causes of a civil nature, real, personal and mixed, within their respective counties, where the debt, damage or other matter in demand exceeds the sum of $15; except bonds and notes for

money or bills of credit only, vouched by two witnesses for $35.

They have also jurisdiction in their respective counties of all pleas of a criminal nature, where the penalty by law is more than $7, and which are not by law exclusively limited to the Superior Court.

They have also jurisdiction of all suits in chancery, in their respective counties, wherein the value of the matter or thing in demand doth not exceed the sum of $335; except suits for relief against a judgment given or cause depending in the Superior Court.

The City Courts have jurisdiction in their respective cities, of all actions of a civil nature, where the cause of action arises within said city, and one of the parties dwell or reside within said city, and wherein the title of land is not concerned, which the County Courts have cognizance of in their respective counties.

The jurisdiction of a single minister of justice extends to all causes of a civil nature within their own towns, wherein the title of land is not concerned, and the debt, damage, or other matter in demand doth not exceed $15; and in actions upon bonds and notes, for money or bills of credit only, vouched by two witnesses, it extends to the sum of $35; unless in any town in the same county there should be no authority, who could try said cause, then they may hold plea in such other town.

It extends likewise, to pleas of a criminal nature where the penalty by law doth not exceed $7; and to require security for the peace and good behavior; to issue a warrant to apprehend persons upon complaint made, for the greatest of-

fenses and to bind over to the court proper to try the same; or commit to prison, as the nature of the case may require.

Besides these courts, the state is divided into twenty-eight districts, in each of which, a Court of Probate is held monthly, by a single judge, who has a clerk, and hath jurisdiction in his district, of the probate of wills, granting letters of administration, appointing appraisers and distributors of estates, and commissioners on insolvent estates, and of limiting the time for the creditors to exhibit their claims against deceased persons' estate, both solvent and insolvent; of giving orders for the assignment of dower; and for the sale of real estate when necessary for the payment of debts; also of appointing guardians to orphan children, and calling them to account; and of doing every other matter proper and necessary for a Court of Probate in the settlement of estates; and an appeal lies from the orders and determinations of these courts to the Superior Court.

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### On Taxation.

A state may be considered as a great family and the members which compose it, indebted to the government, for the protection of their persons, families, dwellings, property, and of all their rights and liberties. All therefore, are interested in supporting it, for all share in the common blessings it confers: And each one ought to contribute in some equitable proportion towards its maintenance.

To this end the law has affixed to each poll, each house, acre of land, horse, ox, cow, and other articles of estate ordered to be rated, a sum; and required each citizen to give in a list or schedule of the polls and ratable estate of which he is possessed, on the 20th of August annually, with the sum prescribed by law annexed, to the listers appointed by the

several towns, who are to receive the lists from the inhabitants of their respective towns; to which they are to make additions or fourfold assessments, where they find any person, hath left out any part of his interest, through willfulness or negligence; also just and reasonable assessments for profits made by lawyers and doctors, merchants and shopkeepers, and by mechanics in the prosecution of their respective professions and business.

A copy of the aggregate amount of the polls and ratable property, and of the sums annexed, with the additions and assessments, the listers of each town are to make out, and send to the general assembly; and from the lists of the several towns thus returned, a general list of the whole state is formed, called the grand levy, and lodged in the office of the secretary; upon which all taxes laid by the general assembly, are to be raised and levied; and the listers are to make out another copy of the lists of their respective towns and lodge with the town clerk; upon which all taxes laid by towns and societies are to be raised and levied. By this means, one general rule of taxation is formed amongst all the citizens, throughout the state. Whenever the general assembly grant a tax, it is to be levied and collected according to this rule; and the treasurer issues his warrants for that purpose, directed to the several collectors appointed by the towns to collect the tax of their respective inhabitants; authorizing and commanding them, to collect and pay said tax by the time set in the act of assembly; and each town is responsible for their respective collectors, and also for the taxes of their respective inhabitants, except such as by law are abated.

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## On the Origin of Property and the Tenure of Lands in Connecticut.

When the Almighty had created the earth he gave it to the children of men, to inhabit upon — he rendered it prolific of

the necessaries and conveniences of life; which were to be drawn forth and raised by cultivation and improvement. While mankind continued in a wild and savage state, and fed upon natural productions, and subsisted by hunting, fishing, and fowling, the lands remained common, and the state of society was ferocious and cruel. The cultivation of the earth by labor and art, gave property in the fruits produced thereby; and in the improvements made upon the land; whereby it was subdued, meliorated and inclosed, and made to yield much advantage to the husbandman.

This was a stimulus to industry, attached men to those spots of earth, which by their own labor, they had subdued and rendered productive — This reduced them from a life of vagrancy, to become settled and stationary, and to build houses for permanent habitation; and to consider their houses and fields as their own separate property, detached from the common stock — This drew mankind together, and induced them to unite in society, for mutual convenience and mutual safety and defense; and at a common expense to surround their dwellings with a wall for protection, against the savage tribes of men.

To effectuate these objects and to enable many people to dwell together, agriculture and other useful arts must be understood and practised, and a certain proportion of mechanics and artificers would be necessary — trade and commerce would be naturally introduced among the people, and in exchanging one commodity for another, credit in some instances would be given and contracts entered into; and in the state of human depravity trespasses would be committed, frauds practised, contracts rescinded, and crimes perpetrated, to the disturbance of the public peace — from hence is the origin of property — of the useful arts — of a state of society — and of the necessity of civil government, containing laws to regulate the intercourse between the citizens, towards each other, and towards the community — to enforce contracts, re-

dress injuries, and to restrain and punish crimes. The power of doing this is originally and underivedly in the great body of the people, and is to be exercised by themselves, where it can be conveniently done; or by those whom they shall constitute and empower in that behalf. The former is a simple democracy; the latter a democracy with aristocratic or elective powers of government; and whoever resisteth the government and the constituted authorities appointed by the people, as aforesaid, resisteth the ordinance of God and commits high treason against the dignity and safety of the republic.

The title of our lands is free, clear and absolute, and every proprietor of land is a prince in his own domains, and lord paramount of the fee. Estates in land are divided into estates in fee-simple, which is an absolute property — estates for life, for years and at will. Estates tail have no existence here, the statute has cut them up by the roots, and has turned them into estates for life in the immediate donee or grantee, and to fee-simple in their issue.

There are five ways in which landed property is passed or transferred from one man to another — by descent, by last will and testament, by deed, by levy of an execution, and by disseisin, or a fifteen years exclusive possession — all of which methods of gaining title to land are regulated and governed by statutes.

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### On the Power of Making Wills, and the Settlement of Estates, Testate and Intestate.

That a man's estate, upon his decease, should be applied to satisfy his just debts and funeral charges, so far as necessary; and that the widow should be entitled to a certain portion of her husband's estate, for her support by way of dower; and that the remainder should descend, and be distributed to

his children and their representatives, if such there be, and in failure of them to the next of kin, in preference to its escheating to the public, or going to strangers, are regulations founded in principles of reason and justice superior to any human institutions and laws.

The right every intelligent free agent hath to dispose of his or her property, by last will and testament or otherways, results from the nature of free agency, and the nature of property; and there is no condition of subordination in civil society so servile and oppressive, as to divest a person of this privilege, who is of competent age and understanding; nor may the laws deprive any of it except for a crime.

Upon the same principles stands the right every person hath of selling, granting, or giving away his property, absolutely or conditionally, wholly or partially — And the statutes of government respecting these various subjects, go upon the idea of these pre-existing rights, and only contain rules and regulations respecting the time and manner in which they may be claimed, exercised and enjoyed, in order to give them the most beneficial effect.

The statute concerning estates, testate and intestate provides that the debts and charges shall be first paid out of the personal estate; if that is not sufficient, lands shall be sold for the purpose; and in case the estate is insolvent, it provides how all the creditors of the deceased shall receive in proportion to their debts; saving in all cases to the widow, necessaries for upholding life, and the use and improvement of one-third of the real estate, of which her husband died seized in his own right, during the term of her natural life; and when the estate is not insolvent, she is entitled to one-third of the personal estate after payment of debts forever, besides her dower in the real estate; and the remainder of the deceased estate, both real and personal, is to be distributed to and among his

children and their legal representatives, if any there be, in equal portions; and on failure of children or legal representatives of them, to the widow one-half of the personal estate, besides her dower in the lands; the residue of the real estate, which came by descent, gift or devise, from his or her parent, ancestor or other kindred, shall belong equally to the brothers and sisters of the intestate, and their legal representatives of the blood of the person or ancestor, from whom such estate comes; and in case there be no such brothers and sisters or legal representatives of them, such real estate, shall be and remain to the next of kin to and of the blood of said ancestor, or person from whom the estate came; and the remainder of said deceased's real and personal estate shall be distributed equally to the brothers and sisters of the intestate and their legal representatives of the whole blood; and if there are no such kindred, then to the parents; and on failure of parents, to the brothers and sisters of the half blood of the intestate; and if there are no brothers and sisters of the whole or half blood nor legal representatives, and no parents; then to every of the next of kin, to the intestate in equal degree, and those who legally represent them.

The statute respecting the age and ability of persons, declares, that all persons of the age of twenty-one years, of right understanding and memory, and not otherwise legally incapable, have full power, authority and liberty to make their wills and testaments and all other lawful alienations of their lands and other estates, etc.

And the law further ordains that devises of real estate shall be witnessed by three witnesses, all of them signing in the presence of the testator, or not be good and valid.

And the statute respecting sales, grants and deeds of houses and lands, is that all deeds, etc. and leases of houses and lands

of more than one year, shall be in writing, subscribed by the grantor and attested by two witnesses, and shall be acknowledged before an assistant, a commissioner or justice of the peace, and shall be recorded in the records of the town where the land lies, or shall not be effectual to hold the lands against any person, except the grantor and his heirs only; and as no time is limited in which deeds are to be recorded, it must be in a reasonable time.

The statutes of foreign countries are binding upon their own subjects and citizens, by virtue of the authority that enacts them; but they have no force here. The rules and maxims of the common law of England are no farther binding there than they are reasonable; and their being reasonable and just in that country, don't make them to be so in this; but whatever is just and reasonable here as applied to our own country and people, ought to have the force of law, and to be binding on the citizens, without regard to their being the laws of any other nation or country.

I have been thus lengthy in my introduction for the purpose of illustrating, what I conceive, to be the true grounds of our common law, and the excellent principles upon which most of our statutes were framed; that scarcely anything is enjoined, or forbidden by them, but what reason and justice would have required without them: And also to enable the reader better to understand the reasons of the decisions in the following reports; also to show the intimate connection that subsists between the moral and civil systems of government, both are from the same fountain, and operate in different ways, to the same end.

I have made but few quotations from the law authorities of other countries; for although it be useful to read them, for the illustration of principles, yet they can have no influence further than that, to control the decisions, I deemed it therefore, to be unnecessary, and derogatory to an independent

nation to be ruled and governed in its judicial proceedings by foreign laws, or authorities.

The republic of bees are governed by their own regulations, and resist all foreign influence with their lives; their honey though extracted from innumerable flowers, by their art and industry they claim to be independently their own.

The following reports are taken from minutes of adjudged cases, made for my own private use without an idea of publishing them; but there being frequent occasion to recur to them to correct or confirm statements of cases made from memory; as also to assist the recollection of the court with respect to points which had been decided; whereby the knowledge of them transpired; and upon the united advice and desire of my brethren of the court; which with me has the weight of an authority, and upon the application of many respectable characters at the bar, and an idea I had entertained that a work of this nature would contribute much to explain and fix the meaning of the laws and render the rules which govern property, more clear and stable; I have been prevailed upon to consent to the publication of them.

I regret my want of ability and leisure, to perform in a better manner so important a service, and have employed what time both in and out of the circuits, could be spared from my public duties, and a necessary attention to my private concerns. My good will to serve the public I hope and trust, will be accepted in lieu of abler deeds.

I have endeavored to avoid prolixity, as far as possible consistent with perspicuity: In many instances I have given only a state of the case out of which the law question arises; in some I found it necessary to recite the declaration and pleadings; in none have I recited the arguments of the counsel.

This volume will seem to come high, to indemnify the expense of printing and publishing; as there are comparatively few people, who will be purchasers of a treatise of this nature; and it would be peculiarly hard on the author not to be indemnified the necessary expense.

I am induced more readily to submit this performance to the public, from my knowledge of mankind; that the most judicious and knowing, who are best able to criticise on literary performances are usually, the most candid.

This volume contains the cases adjudged in the Superior Court, and in the Supreme Court of Errors, where the judgments of the Superior Court have been affirmed or reversed; with the reasons of the Supreme Court so far as I have been able to avail myself of them, from July, A. D. 1789, to June, 1793, inclusively; with a number of cases adjudged previous to that period, not included in Kirby's reports. If this performance meets with approbation, and proper encouragement from the public, the author has it in idea to publish a second volume, containing the adjudged cases from July, A. D. 1793, to March, A. D. 1797, inclusively.

A work of this nature is doubly important at this time; when we are forming a system of jurisprudence congenial to the spirit and principles of our own government; and when the laws of the state and the decisions of the state courts form an important part of the laws of the Union; and govern the federal courts, in all questions relative to the title of lands, and contracts made under the jurisdiction of the laws of the state.

In this introduction, I have given a short sketch of the principles and spirit of the civil constitution of government in the state of Connecticut, and of some of the laws enacted under it; without taking into consideration the relation they bear to the federal government, and the laws of the United

States, or of the sister states. And indeed, to draw a just picture of our national government, which contains within it, the Constitution and laws of the Union; and the Constitutions and laws of each individual state, which all together, form but one great system, that spreads over the whole, and extends its influence to the minutest parts, so that nothing in its essential principles, can be added, or taken away, without creating a superfluity or a defect; for the federal government without the state governments, and the state governments, without the federal, would be altogether deficient; both are essential to the perfection of the system.

And to illustrate the spirit of freedom, of justice and equality which inspires the whole; the harmony and consistency of all the parts of so complicated a machine; the universality of its influence; the energy of its operation; the mutual dependence each state hath upon the others, and every state upon the Union, and the United States upon the particular states, for support, security and peace, would be a work of vast labor and of high importance to the United States; and would give to the world lessons of wisdom, of justice, and of true liberty and equality, in government, never before known, enjoyed or conceived of among men; much less ever before reduced to system and to practice.

It is most devoutly to be wished that some able hand, possessed of wealth, talents and leisure sufficient for the purpose, would undertake and execute a business so arduous and important for the good of mankind.

It would be an everlasting reproach to a government, to employ all its inventive powers in devising modes of punishment, and its authority in executing them, thereby to cause, through fear, a reluctant obedience from its subjects, and to neglect the proper use of the means it possesses, to instruct, qualify and induce its citizens to obey from choice, from principle, and a cordial good will. One is the government

of tyrants, savages and brutes — the other is the reign of God, of enlightened reason and of love.

Such are the Constitutions and laws of the particular states; and the Constitution and laws of the United States; mutually supporting and supported by each other; adapted to the situation and circumstances of the people and of the country, and calculated to give the greatest possible security, liberty and happiness to the citizens; that if we are wise and faithful to ourselves, and to the government and constituted authorities therein, and firmly resist and repel all foreign influence, which is aiming to divide and disorganize our system, and reduce us to a servile submission to their usurped control — we shall long continue to be happy and great as a nation, and become the joy of our friends, the envy of our enemies, and the admiration and wonder of the world.

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### HARTFORD COUNTY, SUPERIOR COURT, MARCH, A. D. 1764.

WILLES v. PITKIN, SHERIFF.

**Money in the hands of an officer received and indorsed by him on an execution, not liable to be levied upon as the property of the creditor in the execution. Money paid upon an assigned debt is the property of the assignee.**

ACTION against the defendant for a false return upon an execution, made by Eleazer Steel, one of his deputies. Issue to the jury.

The facts in the case were — one Josiah Troop was indebted to James Chamberlain and assigned to him a note he had against Amos Fellows and went out of the country — Chamberlain recovers a judgment and execution on said note against Fellows, in Troop's name, and puts the execution into said Eleazer Steel's hands, to collect for him — The plaintiff knowing of this, gets an execution renewed, which he had against said Troop, and put it into the same officer's hands, and directed him to levy it upon the money he collected of Fellows, on Troop's execution; and when Fellows paid it, and the officer received and indorsed it on Troop's execution, the plaintiff was present and directed him to levy his execution

upon it, which the officer refused to do and returned said execution *non est inventus;* and for this the suit is brought.

Question of law referred to the court was, whether the money thus circumstanced, was liable to be taken on execution as the property of Josiah Troop?

By the COURT. The law is so upon the facts aforesaid that the money was not liable to be taken as the property of said Troop. For 1st, The money received and indorsed on the execution, by the officer, is his special property, for which he is liable to the person to whom it is due; and 2d, The general property is in the assignee, by force of the assignment, and not in the promisee.

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**HARTFORD COUNTY, MARCH TERM, A. D. 1769.**

PHELPS v. JEPSON.

**The doctrine of survivorship between joint tenants, exploded.**

ACTION of ejectment for a lot of land in Hartford.

Plea — not guilty. Issue to the jury.

The jury find a special verdict — That Sarah and Hannah Burr were seized in fee of one-half of the demanded premises, by force of a deed from Isaac Burr to them, dated the 18th of January A. D. 1726, and of the other half, by force of a deed from Timothy Phelps, dated, both of said deeds are recited in the special verdict, and convey the estate to said Sarah and Hannah jointly — That they continued so seized until the death of said Sarah — That said Sarah before her death, made and published her last will and testament, which has since been proved and approved, and therein and thereby gave and devised to Isaac Burr, Jr. son of said Isaac, all

her right and title to one moiety of said lot; which will is dated the 26th of September A. D. 1750 — That said Isaac, Jr. died intestate, and his personal estate insolvent — That said land devised to him by said Sarah, was sold pursuant to an act of the general assembly, for the payment of his debts, to Dr. Sylvester Gardner, under whom the defendant claims and holds — That said Hannah survived the said Sarah and by deed of bargain and sale, dated the 24th of August, A. D. 1758, sold and conveyed to the plaintiff all her right, title and interest to said lot of land, which deed is also recited.

And the question of law referred to the court upon the verdict is, whether the plaintiff upon the facts aforesaid is entitled to the whole or only one moiety of the demanded premises — if the former, then the jury find the defendant guilty — if the latter, then the jury find the defendant not guilty.

The judgment of the court upon the special verdict is, that the plaintiff is entitled to only one moiety of the demanded premises.

By this decision the doctrine of survivorship between joint tenants, was exploded, and determined not to be the law in this state, which settled the law as to this point, and has never since, to my knowledge, been contradicted or shaken.

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**WINDHAM COUNTY, ADJOURNED SUPERIOR COURT, FEBRUARY, A. D. 1771.**

BUEL V. CLARK ET AL.

**Lands left by the proprietors in the original laying out of the lots, for the use of highways, belong to the proprietors, if not wanted for that use.**

ACTION of trespass. The case was — The proprietors of the town of Coventry in the original laying of their lots, at a certain place, left a strip of land forty rods wide, for the use of a highway; afterwards, another ten acre division was to be

laid out, and Peter Buel ancestor of the plaintiff, requested to have his lot laid in that place on the highway, which was accordingly done, and the highway reduced to twenty rods in width; this lot of land afterwards came to the plaintiff, and he fenced it in; and the selectmen pulled down the fence, and for that, this action is brought — And not guilty plead — Issue to the jury.

The question was, whether lands left for a highway by the proprietors in the original laying out of their lots, that are not wanted for the use of a highway, belong to the proprietors or the town, and may be taken up by the proprietors and laid out into lots; or whether they belong to the town — by court and jury they belong to the proprietors — and verdict and judgment was for the plaintiff to recover accordingly.

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**FAIRFIELD COUNTY, AUGUST TERM, A. D. 1772.**

THE WIDOW DEFOREST'S APPEAL FROM PROBATE.

**Dower is to be assigned out of the real estate, only, of which the husband died seized.**

CLAIMING dower in all the lands and real estate, of which her husband was seized and possessed at any time during their intermarriage.

By the COURT. The widow is entitled to her dower only in the lands and real estate of which her husband died seized and possessed, in his own right.

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**NEW HAVEN COUNTY, AUGUST TERM, A. D. 1772.**

TROWBRIDGE V. ROYCE.

**A fifteen years' possession given in evidence on the plea of not guilty.**

ACTION of ejectment, for a piece of ground in New Haven, on which was a shop built by the defendant. The defendant plead not guilty — Issue to the jury.

The defendant offered to prove — That he had been in possession more than fifteen years, claiming and holding the same for himself and against all others.

Against this the plaintiff objected — That the law which makes a fifteen years' adverse possession, a bar to the plaintiff's action, was a Statute of Limitation and must be specially plead; to which it was answered by the defendant, and resolved,

By the COURT. That a fifteen years' adverse possession, by force of the statute, makes a title in the defendant; and the statute regulating pleas and pleadings, allows the defendant, under the general issue, to give his title in evidence, or any other matter for his justification, except some act of the plaintiff, etc.

The case upon the evidence appeared to be thus. The plaintiff's ancestor, more than fifteen years before the commencement of this suit, gave the defendant license to build a shop upon this plot of ground, without any consideration, and to use and improve it without any limitation as to time, or reserving any rent, that the defendant accordingly built a shop on said ground, and had continued to use, improve, and enjoy it as his own without claim or molestation from any person for more than fifteen years, etc.— Verdict and judgment was for the defendant.

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**WINDHAM COUNTY, MARCH TERM, A. D. 1772.**

ROBERTSON, A MINOR, v. ROBERTSON, HIS GUARDIAN.

**A guardian not liable to be sued by his ward, until called upon by the judge of probate to account, etc.**

ACTION of account brought by the ward against his guardian.

Plea in bar — Recites the condition of the bond given by the guardian, and says, that the plaintiff is a minor under the age of twenty-one years, that he is and ever has been ready to account to the judge of probate, but had never been called upon by the judge or the plaintiff to render his account, and that by law no action will lie against him, until he has been duly called upon for his account by the judge of probate, agreeable to the condition of his said bond, and has refused — Demurrer — Judgment plea sufficient.

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**NEW LONDON COUNTY, SEPTEMBER TERM, A. D. 1772.**

CHAPMAN v. CHAPMAN.

**Where a penalty is given for continuing a nuisance per week, one only may be sued for at a time.**

UPON a writ of error it was adjudged — That in a prosecution upon the statute for the penalty of five shillings per week, for overflowing the lands of another. The penalty for one week only, may be sued for at a time; as the penalty is given for continuing the nuisance each week, and to oblige him to remove it; it doth not appear but, that, if it had been prosecuted for the first week, it would have produced the effect which the law intended.

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**HARTFORD COUNTY, ADJOURNED SUPERIOR COURT, DECEMBER TERM, A. D. 1772.**

LEE ET UX. v. SEDGWICK.

**Administration is to be granted to the daughter in preference to the son of the eldest son of the intestate.**

APPEAL from probate for granting letters of administration of the grandfather's estate, to the eldest son of his eldest son, in preference of the daughter of the deceased grandfather. Judgment of the Court of Probate was disaffirmed.

REX v. HUMPHREY.

**The passing of counterfeit bills the currency of which is prohibited, is not an offense against the statute.**

INFORMATION for passing counterfeit bills issued by the state of New York, of the new emission, contrary to the statute, etc.

Plea in abatement — That by a late statute of this state, the currency of said bills are prohibited in this state, and thereby the offense is taken away. Judgment that the plea is sufficient.

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**NEW HAVEN COUNTY, FEBRUARY TERM, A. D. 1773.**

BUCKINGHAM ET AL. v. NORTHROP ET AL.

**Deacon of a church a corporation and may take by succession.**

ACTION upon a note given in A. D. 1742, to the deacons of the Second Church in Milford, and to their successors in said office, for the support of the ministry in said church.

This note was given after the church was formed, but before the ecclesiastical society was legally constituted.

The action is brought by the deacons of said church, and successors in said office.

Plea in abatement — That neither the church nor the deacons of the church, are a civil corporation capable of suing or being sued; and that the action ought to have been brought in the name of the executors of the original promisee — Demurrer.

Judgment, plea insufficient — And that the defendant answer over to the action, whereby it was determined, that the deacons of a church are a legal corporation capable of taking by succession.

SEERS v. BLAKESLY.

**The service may be good upon an attachment, although neither person or estate is holden thereby.**

ACTION by attachment. Plea in abatement — That the goods attached are not described in the officer's return with sufficient certainty — Demurrer.

Judgment, plea insufficient — Whether the goods will be eventually holden by the attachment or not, is now immaterial, the service is sufficient to hold the defendant to answer, as it has been read to the defendant; the service is good as a summons.

ALLIN v. COOK.

**If a writ of error is not brought within three years from the day, judgment was entered up, it is barred by the statute.**

WRIT OF ERROR. Plea in bar — That more than three years had elapsed from rendering the judgment complained of, and the date and impetration of the plaintiff's writ; this was denied; and the clerk of the County Court certified the day on which the judgment was entered up which appeared to be more than three years — upon which the plaintiff was barred.

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**HARTFORD COUNTY, MARCH TERM, A. D. 1773.**

NORTHUM v. PHELPS, CONSTABLE.

**An officer is not liable for an eccape where he takes sufficient bail which afterwards fails.**

ACTION for an escape of one Kellogg, who was attached by the defendant in a civil suit in favor of the plaintiff; alleging that he had recovered judgment against said Kellogg, and taken out his execution, and delivered it to the defendant, who had returned it *non est inventus;* whereby he has lost all benefit of said judgment, etc.

Plea in bar — That true he did attach the body of said Kellogg, as the plaintiff has alleged, yet he says that said

Kellogg procured and tendered to him a good and sufficient bond for his appearing at court, and answering to said action executed by then apparently of good and sufficient responsibility; which bond he took, and set said Kellogg at liberty, which by law he was obliged to do; that said Kellogg failed to appear and answer to said suit, and is gone off; that said the bondsman before said judgment was recovered failed, and is broke, and worth nothing, and has secreted himself; and that the defendant offered to assign said bail bond to the plaintiff, but he refused to take it.— Demurrer — Judgment that the plea is sufficient.

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**NEW LONDON COUNTY, MARCH TERM, A. D. 1773.**

HYDE V. PARK.

**In an action of account for money received of a third person, such third person may be a witness to prove the delivery.**

ACTION of account for money had and received in Great Britain, of Gen. Phinehas Lyman, etc.

Plea — That the defendant was never bailiff, and receiver of the plaintiff's money, etc.

The plaintiff offered the deposition of Gen. Lyman to prove the receipt of the money; this was objected against but admitted by the court.

RIX V. STRONG.

**Trover lies for property tendered upon a note, in favor of the promisee, although he did accept it at the time.**

ACTION of trover for a number of horses — Plea not guilty to the jury.

The facts were — Rix had a note against one Bacon for £24 10s., payable in horses, at a certain time and place in Lebanon. Bacon tendered the horses at time and place, and Rix refused them, and brought an action upon the note; to

which Bacon plead the tender of the horses and prevailed. Rix then looked after his horses and found that the defendant had taken them away. He went and demanded them and brought this action.

And verdict and judgment was for the plaintiff to recover, for as the tender was legal, the property of the horses was vested in the plaintiff.

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**HARTFORD COUNTY, SEPTEMBER TERM, A. D. 1773.**

FITCH v. SCOVEL.

**An *audita querela* is appealable, though the judgment complained of was on a note which was not.**

WRIT OF ERROR, complaining of a judgment of the County Court, in denying an appeal upon an *audita querela*.

The judgment on which the execution issued, that is, complained of, in the *audita* was upon a note for money only, vouched by two witnesses.

Nothing erroneous plead; and judgment, manifest error — for that an appeal ought to have been granted.

WEBSTER v. PRICE.

**The bond on a replevin comes in place of the property and must respond.**

WRIT OF ERROR. Price took Webster's sheep damage feasant and impounded them; Webster replevied them, and charged Price in trespass for the taking; the justice gave judgment in favor of Price upon the replevin, and that Webster should pay the damage, or return the sheep; Webster appeals to the County Court, but did not prosecute his appeal; Price took out the copies and entered them in the adjourned court and had the judgment of the justice affirmed, and then brings a *scire facias* upon the replevin bond. Webster plead *nul tiel*

*record;* Price replied and set forth the bond and record, and prayed inspection, etc. The court find that there is such a record; and give judgment for the plaintiff to recover. And now this writ of error is brought, assigning for error, that Price had no right to enter for affirmance of judgment at the adjourned court, but ought to have entered at the stated court to which the cause was appealed.

Judgment — That there is nothing erroneous in the judgment complained of; without deciding whether Price had right to enter at the adjourned court for affirmance of judgment or not, for the replevin bond came in lieu of the property, and the action of trespass in the replevin was determined against the plaintiff; and although he appealed, yet he failed to prosecute the appeal — he therefore is liable upon the bond.

## Thomas v. Welles.

**A promise to see another forthcoming at a certain time or to pay the debt, void, unless in writing.**

Error. Welles was a constable of the town of Hartford, had a rate warrant and a rate against Jacob Brown for which he levied upon Brown's body and was about to commit him to goal. Thomas, in consideration that Welles would suspend any further proceedings against Brown, that night, assumed and promised that he would see him forthcoming to said officer the next morning, or he would pay the debt. Upon this Welles released said Brown, and Thomas did not see him forthcoming, nor has he paid the debt, etc.

Plea in bar — The Statute against Frauds and Purjuries; demurrer. Judgment — That the plea is insufficient, and for plaintiff to recover.

Error assigned is — That the plea was sufficient. Judgment — Manifest error; for this is clearly a promise for the debt and duty of another.

ELLIOT V. MIX ET AL.

An *alias* execution granted against the estate of a debtor who went out of prison after taking the oath, for want of support.

SCIRE FACIAS against the executors of Ebenezer Mix. Elliot committed said Ebenezer to prison on an execution; said Ebenezer took the poor prisoner's oath, and Elliot neglected to furnish money for his support, and he went out of goal without paying the debt. This *scire facias* alleges that the oath was fraudulent, and that said Ebenezer left a plentiful estate in the hands of his executors, and prays for an execution against them — Upon which the court granted an *alias* execution against the estate of said Ebenezer in the hands of his executors.

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**NEW LONDON COUNTY, SEPTEMBER, A. D. 1773.**

HALLAM AND ADAMS V. MUMFORD.

One defendant cannot take advantage of the other's minority to avoid a note.

ERROR. Mumford sued Hallam and Adams upon a joint and several note, given by them when Hallam was under age. Adams plead Hallam's minority in abatement of the suit. The County Court overruled the plea in abatement, and gave judgment against both upon default.

Error assigned is — That the County Court ought to have judged said plea in abatement, sufficient.

Judgment — Nothing erroneous; for Adams could not take advantage of Hallam's minority — 2d. the note of a minor is not absolutely void, but only voidable.

---

**NEW HAVEN COUNTY, ADJOURNED SUPERIOR COURT, A. D. 1773.**

FORD V. ATWATER.

Fraud and imposition will avoid the transfer of property.

ACTION of trover for a pair of oxen. Issue to the jury.

The case was — One Graham, a worthless fellow, both in point of character and estate, dressed himself up so as to have the appearance of a man of property and character, applied to the plaintiff and purchased his oxen on credit, for which Graham gave his note. The defendant received the oxen of Graham, and had them in keeping. Ford finds out the imposition practiced upon him by Graham, and that he was a villain and a bankrupt; and hearing that the defendant had the oxen in keeping, went and told him how he had been defrauded by Graham, and demanded the oxen of the defendant, who refused to deliver them — and thereupon he brought this action.

Verdict and judgment for the plaintiff to recover, upon the ground that Graham had not acquired property in the oxen by reason of the fraud.

REX v. HANSON.

**Burglary is an offense at common law, and the statute prescribes the punishment.**

INFORMATION for a burglary, laid upon the old statute, upon which Hanson was found guilty; he then moved in arrest, that since the commission of the burglary complained of, the legislature had made a new statute, altering the punishment for burglary and repealing the old law, so far as respects the punishment; and that the prisoner cannot be convicted upon one statute and punished by another.

Motion judged to be insufficient; for burglary is an offense at common law, and the statute only declares the punishment.

TAINTER v. BROCKWAY.

**A parol promise to convey land in consideration of a promise to pay for them is void by the statute, etc.**

ACTION upon a parol contract, in which the defendant in consideration of £600 which the plaintiff promised to pay him for a certain farm, and of $3 received as earnest money; the defendant agreed and promised to convey to her by deed, etc. his said farm, etc. describes it, and then assigns

a breach. The defendant pleads the Statute against Frauds and Perjuries, and avers said contract was by parol, etc.

Judgment — Plea sufficient. This is an executory contract, for the sale of lands and the payment of the $3 earnest, is not an execution of it, on one part.

TOWN OF WATERBURY v. HURLBURT.

**An action at law will not lie against a son for the support of a parent, but an application upon the statute must be made to the County Court.**

ACTION of *assumpsit*, declaring, that the defendant's father fell sick in said Waterbury; that the selectmen provided for him, to the amount of £17; that the father hath no property, and that the defendant is his son and is of sufficient ability, and by the laws of the state liable to pay said expenses, and being so liable, assumed, etc. Plea *non assumpsit*. Issue to the jury.

The facts were not much controverted. The plaintiffs insisted, that as the statute created the duty, the common law supplied the remedy. To which it was answered by the defendant, that by the common law he is not liable at all; and by the statute, only *submodo*, viz. by a particular application to the County Court, and only on condition he is of ability, and of this the County Court are made the sole judges.

Verdict and judgment for the defendant.

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**HARTFORD ADJOURNED SUPERIOR COURT, DECEMBER, A. D. 1773.**

BROWN V. CORNWELL.

**Stock on deck thrown overboard to save the vessel and cargo, entitled to an average loss.**

ACTION upon the statute for the average loss of five horses thrown overboard in a storm to save the vessel and cargo. Not guilty plead.

The jury find a special verdict — That the vessel sailed the 17th of November, sprung a leak on the 24th of December, that the water gained upon the pumps, the horses then all well and secure, etc. and that upon consultation on board, it was determined that all the horses, hay and oats must be thrown overboard in order to save the vessel, the lives of the people and the rest of the cargo; and in pursuance of said consultation, the plaintiff's five horses were thrown overboard and lost; that said vessel and cargo was saved, and arrived in safety at St. Croix, her destined port, and the defendant sold said cargo and received the avails.

The question put to the court was — Whether stock shipped upon the deck in case it is thrown overboard to save the vessel and the rest of the cargo, will entitle the owners to an average upon the goods, etc. shipped in the hole of the vessel, that were saved.

The court determined that the law was so, that it did; and judgment was for the plaintiff to recover. That although stock upon deck is more exposed to danger, and in a storm exposes the vessel to greater risk than goods in the hole, yet as it is the universal custom to ship goods in the hole, with stock upon deck; when the stock upon deck is thrown overboard for the express purpose of saving from destruction the cargo in the hole, it is but reasonable that the cargo saved should bear a proportion of the loss, which was the price of its ransom.

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**HARTFORD COUNTY, MARCH TERM, A. D. 1774.**

HARTMYER v. GATES.

**A deed when recorded shall relate back to the time when received, unless the delay is caused by the fraud or fault of the grantee.**

ACTION of ejectment for a certain farm. Issue to the jury.

The case was — Joshua Chandler on the 16th of April, A. D. 1765, owned the farm and gave a deed of it to the plaintiff, dated the 30th of October, in satisfaction of a debt he owed him; who then resided in England, and said Chandler carried it to the town clerk and had it entered upon; received for record, and gave orders for it not to be recorded at length until further orders, without the knowledge or direction of the plaintiff; the town clerk made this entry upon the deed, "October 30 A. D. 1765 received for record, and not entered till further orders." A Mr. Ackley had an execution against Chandler, who had now become bankrupt, and the defendant having found the situation of the plaintiff's deed, takes an assignment of said execution from Ackley and levied it upon the farm, and had it set off upon the execution, some time in A. D. 1767, and had it recorded. In May, A. D. 1772, Dr. Johnson returned from England, who was attorney to the plaintiff, and finding the situation of the deed and of the farm, caused said deed to be recorded at length.

The plaintiff relied upon the fraud practiced by Chandler, and the neglect of the town clerk, as the only reason why the deed was not sooner recorded; and that the plaintiff ought not to be prejudiced in his title without any fault of his; and upon the doctrine of relation, that whenever the deed was recorded at length, it related back and had operation from the time it was entered upon, received for record.

The defendant insisted, as his title was first completed he ought to hold, especially as he otherways would be decoyed and injured, by the plaintiff's deed lying in that situation.

Verdict and judgment was for the plaintiff; on the ground that the plaintiff was in no fault, and had done nothing to prevent said deed's being recorded at length.

**NEW LONDON COUNTY, MARCH, A. D. 1774.**

REX v. HUMPHREY.

**A burglary may be committed on the cabin of a vessel.**

INFORMATION for a burglary committed upon the cabin of a vessel lying in the harbor of New London, and stealing from thence some coffee, etc.

Plea in abatement — That a cabin of a vessel is not a house or shop, within the meaning of the statute.— Judgment — Plea in abatement is insufficient.

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**NEW HAVEN COUNTY, AUGUST TERM, A. D. 1774.**

REDFIELD v. HILLHOUSE.

**Money due on a note which is assigned, is the property of the assignee.**

SCIRE FACIAS against him, as agent and factor to Isaac Colton, an absconding debtor.

The case was — Isaac Colton assigned a note he had against one Hull, to William Colton, with a power of attorney; William puts it into the hands of Mr. Hillhouse to collect, and he collected the money upon it; Redfield instituted an action against said Isaac as an absconding debtor, and served Mr. Hillhouse with a copy; he recovered a judgment and execution against Isaac and the execution was returned *non est inventus*, and thereupon he brings this *scire facias* against Mr. Hillhouse; and the defendant pleads that he never was agent, factor or attorney to said Isaac, etc.

The only question upon this issue, was — Whether the property of this money was in Isaac, the promisee, or in William, the assignee of the note?

The court decided the property to be in the assignee, and that said Hillhouse was not agent, factor or attorney to said Isaac.

In the case of Bildad Fowler v. John Harmon, tried at Hartford, March term, A. D. 1772, the plaintiff was assignee of a note payable in grain; the promisor tendered the grain at time and place specified in the note, as it was to be delivered at his own house; after the tender, it remained there some time, the plaintiff not being there to receive it; a creditor of the promisee, prayed out an attachment against him, and gave it to the defendant, who was a constable, and he attached the grain as the property of the promisee and took it away. The plaintiff when he came found his grain was gone, and who had got it, and he instituted an action of trover against the constable for the grain — the defendant plead not guilty; issue to the jury.

The only question in this case, was — To whom the grain belonged — whether to the promisee or the plaintiff, to whom the note was assigned.

Verdict and judgment was for the plaintiff to recover; for by the assignment of the note, the property of the grain upon the tender, vested in the assignee. See Rix v. Strong, *ante.*

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**NEW HAVEN COUNTY, FEBRUARY TERM, A. D. 1774.**

THOMPSON & BARKER v. ALSOP.

**An intentional deviation will not excuse the underwriters, but there must be an actual deviation.**

ACTION upon a policy of insurance, for £400, insured upon the sloop from Branford in Connecticut, to Antigua in the West Indies, and back again to said Branford, for damages suffered at sea, with a deduction of two and a half per cent. in case of loss, etc.

The plea in bar admits the policy; but says, that said vessel on her return from said Antigua, arrived safe at Teaches hole,

a place of safety in North Carolina, without having suffered any loss, within the meaning of the policy, on the 21st of March, A. D. 1771; and Price the master, being also supercargo, there altered the voyage for the benefit of the owners, and sailed up Pungo river, about fifty miles into the country, and there loaded and cleared out to go back to the West Indies, and sent a part of the cargo home to her owners, with information of the alteration of said voyage; which her owners approved of, and caused £600 to be insured upon said second voyage; and that said loss happened after the alteration of said voyage as aforesaid.

The plaintiffs reply and traverse the defendant's plea with respect to the alteration of said voyage, and the loss happening subsequent to said alteration. And thereupon the parties were at issue to the jury.

It was agreed that the vessel arrived safe at Teaches hole; that she went up Pungo river into the country; that upon her return down said river, in passing over the Swash, so called, she was lost, which was in the road both to Branford and the West Indies.

By the defendant it was contended that Teaches hole was a place of safety; that going up Pungo river fifty miles into the country, was unnecessary and so a deviation, and the vessel being lost after such deviation in coming down said river and passing over the Swash, the insurers are not liable.

For the plaintiffs it was insisted, that going up said Pungo river fifty miles into the country was necessary for safety, and no deviation; but if it was not necessary, it was not for the benefit of the owners, nor with their approbation, and so was by the barratry of the master; and that said vessel was lost in her direct road to Branford, as well as to the West Indies; there was therefore, no deviation in fact, whatever might have been intended; so that the defendant is liable.

2 Strange, 1249, Foster v. Wilmot; 2 Ld. Raym. 1349, Knight v. Cambridge.

The jury found a verdict for the plaintiff, and £400 damages. The defendant moved in arrest that the jury had not deducted the two and half per cent. agreeable to the policy, so that the verdict was wrong in point of damages. Upon which the plaintiffs entered a remittitur of the two and half per cent. The cause was continued; and judgment for the plaintiffs — but afterwards a new trial was granted, on the ground of new discovered evidence.

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**HARTFORD COUNTY, SEPTEMBER TERM, A. D. 1774.**

KNOT V. GAY ET AL.

**An arrest may be made without warrant to prevent a breach of the peace or to prevent an escape, etc.**

ACTION of trespass, for assault and battery, and for breaking open his shop. The defendants plead severally, not guilty. Issue to the jury — who find the following facts in a special verdict, viz.

That on the evening next after the day of it being Saturday night, one Rose and Charles Knot came to the plaintiff's shop, and proposed to swap shoe buckles, and sent and got a pint of rum; Charles scrupled whether Rose's buckles were silver and refused to swap, upon which Rose told him he must pay his bottle; Charles said he should not, upon which Rose stripped and begun to threaten; Charles turned to go out of the shop; the plaintiff then stepped up and shut the door, Rose then struck said Charles on the head, which knocked him down and he lay some time for dead; after a while he recovered and got up; some people came in and Charles went out of the shop; the plaintiff then shut the door and locked it, with Rose in it; the defendants said Gay, being a justice of the peace, and the other a constable, hearing of the affray came up, found the shop locked up with

Rose in it; Justice Gay demanded of the plaintiff to open his shop and he refused, and struck at the justice when he attempted to get in, upon which said Gay gave parol orders to the constable to break open the plaintiff's shop and to take said Rose, if Rose could not be taken without. And thereupon in obedience to said orders, the constable broke open said shop and took said Rose, and also the plaintiff and set them at liberty upon their promise to appear on the next Monday morning.

The question of law referred to the court upon this verdict, was — Whether, upon the facts aforesaid, the justice had right by law, to give parol orders to the constable to break said shop and to take said Rose; for if he had, then both the constable and the justice must be found not guilty.

The principles of the law with respect to the cases in which an arrest, by a parol warrant or authority may be made, were not much disputed; that it might be done to prevent a breach of the peace, which was about to take place; also where an high-handed offense had been committed, and an immediate arrest became necessary, to prevent an escape, and that in these cases an arrest would be justified, made by any person with or without warrant. The doubt was — Whether the facts in the case brought it within the law.

The court gave judgment; that the law is so upon the facts found, that the breaking said shop and arresting said Rose and the plaintiff was lawful and right, and that the defendants are not guilty.

CHAPMAN AND STEEL, TRUSTEES OF CALDWELL, AN INSOLVENT DEBTOR, BY SPECIAL ACT OF ASSEMBLY v. THOMAS.

**The authority of trustees to an insolvent debtor, is joint.**

PLEA in abatement; that since the commencement of this suit, and before any interlocutory judgment therein, the said

Eleazer Steel, one of the plaintiffs died, and that the authority of the plaintiffs, as trustees, is by the act of assembly a joint authority, and doth not survive to the surviving plaintiff — Demurrer.

Judgment — That the plea is sufficient.

MRS. LANE, THE WIDOW OF LANE, DECEASED, v. COPLY.

**Fifteen years exclusive possession by the son, a bar to the right of the father.**

ACTION of ejectment for dower. Plea not guilty — Issue to the jury; who find the following facts, viz.

That thirty years before the date and impetration of the plaintiff's writ, Enos Lane, under whom the defendant claims, and the son of said deceased, by liberty from his father, entered upon said land, which his father then owned, lying in a wilderness state, cleared and fenced the land, planted an orchard and built a house and barn upon it and improved the whole, taking all the profits to himself, until the death of his said father, which happened in A. D. 1770.

The question of law referred to the court was — Whether the father at the time of his death was divested of his right and title to said lands by the son's entering and possessing as aforesaid, for more than fifteen years.

The opinion of the court upon the facts, was — That the father was divested of his right and title to said land, at the time of his death — and the defendant was found not guilty.

TOWN OF WETHERSFIELD V. STAMFORD.

**Action at law lies for one town against another for providing for a pauper in case of sickness.**

ACTION of *assumpsit* for boarding, nursing and doctoring one Bates, a pauper belonging to the town of Stamford.

Coply v. Crane.

Plea in abatement — That by a statute entitled an act providing in case of sickness, (law book page 225,) the County Court in the county in which the town lies, to which such pauper belongs, only, hath jurisdiction of such cases to grant relief upon application made agreeable to said statute.— Demurrer.

Judgment — That the plea in abatement is insufficient. The general law makes it the duty of every town to provide for and support their own poor, generally, and the common law supplies the remedy; the statute referred to in the plea, provides a particular mode of redress in a summary way, in certain cases, but doth not take away the common-law remedy by action.

REX v. PEAS.

**A thief may be taken up and tried wherever he carries the stolen goods.**

INFORMATION charging said Peas with having feloniously taken and stolen a horse at Rye in the province of New York, and rode him to Farmington in the county of Hartford.

To which information a plea in abatement was given — That the offense is laid to have been committed at Rye in the province of New York, and that the courts in the province of New York only, having jurisdiction of said cause, and not the courts in the colony of Connecticut. Judgment — that the plea is sufficient.

A new information was then exhibited charging said offense to have been committed at Farmington, in the county of Hartford — upon which he was convicted and punished.

COPLY v. CRANE.

**Partition is to be demanded according to certain rights and proportions for quantity and quality.**

ACTION of partition, in which the plaintiff declares, that she has right to have apparted and set out to her, seven acres and three-quarters of an acre, by metes and bounds, it being her just proportion of a tract of land containing thirty-three acres;

and that the defendant hath right to have the residue of said land, etc. Issue to the jury, who find a verdict for the plaintiff — the defendant moves in arrest of judgment, that the plaintiff's declaration is insufficient.

Because partition may not be demanded of any certain located part or number of acres, but of the plaintiff's right or proportion for quantity and quality, in the whole tract; the motion in arrest was judged sufficient, and no cost allowed to either party.

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**WINDHAM, ADJOURNED SUPERIOR COURT, JANUARY, A. D. 1775.**

HOVEY V. SHUMWAY.

**Taking more than lawful interest upon a note, will not avoid it, if at first it was fairly made without any corrupt agreement.**

ERROR to reverse a judgment of the County Court in an action brought by Hovey against Shunway, on a note dated January A. D. 1767, for £30 payable in one year, with the lawful interest.

The defendant plead in bar of the action — That at the date of the note, on which etc. it was corruptly agreed by and between the plaintiff and defendant, that the defendant should give to the plaintiff a note for £3, for the interest of said £30, for one year over and above the lawful interest secured by said £30 note; and that at the end of one year he should give another note for £3 5s. for loan and interest, over and above the lawful interest for another year, and seventeen shillings more for the loan and interest of said £30 note for the third year, over and above the lawful interest, secured by said note: And in pursuance of said corrupt agreement, the several notes aforesaid were executed and given, and the note on which, etc. and that there is included in and secured by the note on which

£7 2s. by said corrupt agreement, for the loan and interest of said £30 note over and above the lawful interest.

Plaintiff replies that he ought not to be barred without that, that at the date of the note on which, etc. it was corruptly agreed between the plaintiff and defendant, that the defendant should give a note for the sum of £3, for the loan and interest of said £30 note for one year, over and above the lawful interest; and without that, that the defendant in pursuance of said corrupt agreement, did execute and give said £3 note for the loan and interest of said £30 note, for one year, over and above the lawful interest; and that there is included in and secured by the note on which, etc. £7 2s. or any sum over and above the lawful interest, at 6 per cent. per annum.

To this reply the defendant demurred, and judgment of the County Court was — That the reply was insufficient, and for the defendant to recover his cost.

Error assigned is — That the County Court ought to have adjudged said reply to have been sufficient.

This judgment was reversed in the Superior Court. For by the traverse, the corrupt agreement to give a note for £3, and the giving of such note for loan and interest of the note on which, etc. at the date of it, over and above the lawful interest, for one year is denied, and by the demurrer is laid out of the case.

And the defendant's giving a note for £3 5s. after one year, and paying seventeen shillings after two years, for more than lawful interest, cannot vitiate or avoid the note on which, etc. which appears to have been fairly taken, without any corrupt agreement, or unlawful interest secured at the time of taking it. 5 Vol. Bacon, title Usury.

ANDRUS V. ANDRUS.

**A receipt to a joint obligor of his part no discharge of the other.**

ACTION on bond for £50. Conditioned that they should pay to the plaintiff forty shillings on the 25th of April annually; alleging that they had not paid her said sums, etc.

Plea in bar — That said Zebulon paid to the plaintiff twenty shillings on the 25th of April annually, in each year, for three years successively, from the date of said bond; and that the plaintiff thereupon executed to the said Zebulon her receipts, for each payment therein, acknowledging, that she had received of said Zebulon twenty shillings in each year, in full of his part to pay.

The plaintiff demurrs — And judgment that the plea is insufficient — the receipts show, that said Zebulon had paid his equitable part for those years as it respected him, but can be no bar to her as to what is still behind and unpaid.

FITCH, SHERIFF, V. BADGER.

**A prisoner released by act of assembly, no escape to subject the sheriff.**

ACTION on bond. Conditioned that one Samuel Cobb, who was imprisoned on an execution in favor of Perkins, etc. should abide a true and faithful prisoner; alleging that he had made his escape, etc.

Plea in bar — That said Cobb, preferred his petition to the general assembly, praying for an act of insolvency to be passed in his favor, and that in the meantime he should be liberated from his imprisonment on said execution; Cobb cited his creditors and amongst the rest said Perkins, etc. which petition, the assembly continued, and appointed a committee upon it, and passed a resolve, that said Cobb be liberated from his imprisonment, on said execution, in the meantime; upon which he went out of prison; that his petition was finally negatived, and said Cobb went off, and never after returned; alleging,

that this is the same escaping complained of in the plaintiff's declaration.

The plaintiff replied that said Badger is amply indemnified by said Cobb, against said bond.

The defendant demurred — And judgment that the reply of the plaintiff is insufficient, for Cobb was set at liberty by the resolve of assembly, and the defendant could not help it.

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**WINDHAM COUNTY, MARCH TERM, A. D. 1775.**

VENNER v. UNDERWOOD.

**The plaintiff's entering into possession of the demanded premises, pending the action of ejectment will not abate it.**

ACTION of ejectment for a tract of land. Plea in abatement — That after this action was appealed into the Superior Court, and depending there, the plaintiff entered into possession of the demanded premises and put the defendant out of possession, and the plaintiff still continues in possession, and holds the defendant out.

This plea was demurred to — and judgment that the plea in abatement is insufficient — For the original wrong and disseisin, and the damages still remain to be redressed.

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**LITCHFIELD COUNTY, AUGUST TERM, A. D. 1775.**

MOTT v. HURD.

**A promise to pay or discount for what a tract of land shall fall short of the quantity in the deed, not within the Statute against Frauds and Perjuries.**

ACTION of assumpsit, declaring — That in April, A. D. 1772, the defendant sold to the plaintiff sixty-eight acres of land for £200; that at the time of said bargain and sale it was agreed by the plaintiff and defendant, that if said tract of

land exceeded sixty-eight acres, the plaintiff would pay in proportion for the excess, and if it fell short of that quantity, the defendant would deduct in the same proportion from said sum of £200; that in consideration of the agreement aforesaid, the defendant assumed and promised to deduct from said sum of £200 in proportion to what it should fall short; that thereupon the defendant gave a deed of said land to the plaintiff and the plaintiff executed his note to the defendant for £200; and that said tract of land falls short sixteen acres of sixty-eight acres, whereby the defendant became liable to pay for said deficiency by deducting it from said £200, which he refuses to do, etc. The defendant plead in bar, the Statute against Frauds and Perjuries, and that said promise was not reduced to writing, etc. Demurrer.

Judgment — That the plea is insufficient.

The case of Gillet v. Burr, determined at the adjourned Superior Court, at Hartford, December A. D. 1773 was cited, which was an action of assumpsit, declaring, that in consideration the plaintiff would give the defendant a deed of a certain tract of land, and call it fifty acres, more or less, and take his note for the same at fifty-five shillings per acre, and would also agree, that if said land upon being measured should fall short of that quantity, the plaintiff would discount it upon said note at the same rate per acre; the defendant agreed and promised to pay the plaintiff in the same proportion for whatever said land should exceed fifty acres; that accordingly the plaintiff gave a deed of said land to the defendant and took his note as aforesaid; and that said land upon an accurate mensuration was found to exceed fifty acres, seventeen acres and a half, amounting to £48 2s. which the defendant has never paid although he has been notified thereof and the same been often requested, etc.

Plea — Nonassumpsit. Issue to the jury — and verdict for the plaintiff to recover.

In this case there was no written note or memorandum of the agreement and promise. A motion in arrest was made, 1st, That the parol agreement was absorbed by the giving of the deed; 2d, No time is set or person appointed, when, and by whom said land should be measured; 3d, That a special notice and request was necessary to entitle the plaintiff to an action, which is not laid in the declaration to have been given or made.

The court determined the motion to be insufficient and the plaintiff had judgment.

STUART v. PIERCE.

**Writ of error lies against the judgment of the justices on a complaint for a forcible entry, etc.**

A WRIT OF ERROR, to reverse the proceedings and judgment of two justices, on a complaint upon the Statute for a Forcible Entry and Detainer. Plea in abatement, that no writ of error lies in such case.

Judgment — That the plea is insufficient.

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**NEW HAVEN COUNTY, DECEMBER ADJOURNED TERM, A. D. 1775.**

KISHAM ET AL., EXECUTORS OF HAZARD, DECEASED, v. NICHOLS.

**Under the plea of full payment accord and satisfaction cannot be given in evidence. The defendant may have liberty to alter his plea although the case is on trial to the jury.**

SCIRE FACIAS on a judgment: — To which the defendant plead full payment to said deceased of the said judgment before the date and impetration of the plaintiff's writ, and offered in evidence, a deed of land to said deceased and an agreement on his part to accept it in satisfaction of said judgment; which evidence was objected to under this issue, and by the court was not admitted. Upon which the defendant moved

for liberty to alter his plea and to plead the accord and satisfaction by said lands; which the court allowed. The consequence was, that the trial could not proceed at that time, and the cause was continued.

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**WINDHAM COUNTY, ADJOURNED TERM, A. D. 1775.**

AVERY v. WOODRUFF.

**The deposition of another who had a child sick that she could not leave it, admitted.**

ACTION of trover. The deposition of a woman who lived within twenty miles of the court, that had a child of a month old, dangerously sick so that the mother could not leave it to attend court, was taken, and objected against as not coming within the statute; but by the court, was admitted upon the ground that it came within the reason of the statute.

REX v. BARBER.

**Where a prisoner procured a witness to go away, evidence of what he had testified before the justice admitted.**

INFORMATION for counterfeiting, etc. One White, who had testified before the justice and before the grand jury against Barber, and minutes taken of his testimony, was sent away by one Bullock, a friend of Barber's, and by his instigation; so that he could not be had to testify before the petit jury.

The court admitted witnesses to relate what White had before testified.

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**HARTFORD ADJOURNED SUPERIOR COURT, DECEMBER, A. D. 1775.**

HALL v. DWIGHT ET AL.

**Where a witness is interested in the question of fact on trial he cannot be admitted.**

ACTION for a malicious prosecution for a riot, brought against the plaintiff with a number of others, of which he and

the other persons were acquitted, upon trial on the plea of not guilty to the jury. The plaintiff offered those persons who were prosecuted with him and acquitted, as witnesses, but they were objected to, and by the court not admitted, because they were interested in the question of fact on trial.

HOLMES v. KENNEDY.

In an action of ejectment to recover possession, by a lessor from the lessee, he is estopped to say the plaintiff hath no right.

ACTION of ejectment for a farm which the plaintiff had mortgaged to Mr. Apthorp; he paid the interest of the debt to Apthorp, and took a parol lease from him of said farm for a term: Holmes leased the farm to the defendant for a number of years; at the expiration of the term the defendant refused to resign up the premises; and on trial upon the general issue to the jury, the defendant insisted, that the plaintiff had no title to the land; but that the title was in Apthorp; the mortgage deed having become absolute at law.

To which it was replied — That the plaintiff was rightfully and lawfully in the possession; that the defendant received from the plaintiff the possession; also a lease of the farm under which he held and enjoyed; he is therefore estopped to object against the plaintiff's right to recover against him.— And verdict and judgment was for the plaintiff to recover.

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## HARTFORD, ADJOURNED SUPERIOR COURT, DECEMBER, A. D. 1777.

CLARK v. BROWN ET UX.

ERROR to reverse a judgment of the County Court, in an action of assumpsit, brought by said Brown and wife against Clark; declaring, that in consideration of a deed executed by

the wife, when a *feme sole*, of a certain piece of land, described, the said Clark assumed and promised to pay to her the sum of £14 lawful money in a reasonable time; which he has never performed.

To this declaration the defendant demurred — And judgment of the County Court, that the declaration is sufficient; and for the plaintiffs to recover.

Errors assigned are — 1st. That there is no direct averment that said deed was ever delivered. 2d. That said promise is by parol, and within the statute made to prevent frauds and perjuries.

Judgment of the Superior Court — That there is nothing erroneous in the judgment complained of. For first, the defendant cannot take advantage of the statute upon a general demurrer, for the plaintiff may have a written note or memorandum of the promise, which he might produce in evidence. 2d. This action is not brought on the parol agreement only, but upon an agreement executed on one part; and so is not within the statute. Gilbert Court of Chancery, 231; 1 Bacon Ab. 74, and 75; 2 Str. 783; 1 Blac. Reports, 600.

### Bulkley v. Bulkley et al.

**A devise to three of the use of a mill during their natural lives, and to the heirs of the longest liver of them in fee; on the death of either his part descends to his heirs until all three are dead.**

Action of ejectment for a mill and dam, etc. at Dividend. Plea not guilty. Issue to the jury.

The case was — In A. D. 1749, Bulkley the father of the plaintiff, and grandfather of the defendants, owned the estate, and by his last will since proved and approved, devised all his lands to his three sons, Jonathan, Gershom and Peter in fee-simple; to be equally divided between them; and that his said three sons should have the improvement of said mill, etc. in

equal proportions, during their natural lives; and upon the decease of his said three sons, said mill, etc. should pass to the male heirs of either of his said three sons, that should be the longest liver in the world: The three sons made partition of all the lands, except three acres, on which the mill stood; they rebuilt the mill and kept it in repair and paid an annuity of £5 to their mother. After the decease of Jonathan and Peter, their sons, who are the defendants, contributed to the repairs and shared the profits of said mill with their uncle, the plaintiff, and they had built a new mill by the side of the old one.

Two points were made upon the construction of this will: 1st, Whether upon the death of Jonathan and Peter, their interest in said mill vested in the plaintiff, being the survivor, or descended to their heirs until all three of the brothers, should be dead? 2d. Whether, as the devise of all the lands, on which the mill stood, was to all three of the sons in fee, it did not pass the whole interest in the mills, with the use of them, to said three sons; notwithstanding the particular bequest of the use to the male heirs of the longest liver.

The court and jury were clear for the defendants upon the first point, and it was not necessary then to determine the second. Verdict and judgment passed for the defendants.

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**NEW LONDON COUNTY, MARCH TERM, A. D. 1780.**

MANWARING v. TABOR.

**A devise to a man and the heirs male of his body lawfully begotten is an estate tail.**

ACTION of ejectment for a farm of land. The plea is not guilty. Issue to the jury.

The case was — Richard Manwaring, father of the plaintiff, in A. D. 1739 gave the demanded premises, by deed, to his

sons, in manner following, viz. to his son Asa and the heir male of his body, lawfully begotten, and so on in like manner unto the fifth generation; and in failure of such heir male of his son Asa, to his son Richard and to his heir male of his body, etc. unto the fifth generation; and in failure of such heir male of his son Richard, to his son Henry and his heir male in like manner; and in failure of such heir male of his son Henry, to his son Christopher and his heir male of his body, lawfully begotten, in like manner. Richard and Henry died in the lifetime of Asa, without issue male; Asa, after the death of his father, entered and sold the estate to Daniels and Tinker, and they sold and conveyed it to the defendant. Finally, Asa died without heir male of his body, etc. or ever having had any; now Christopher claims the estate by force of said deed, and this action is brought to recover it.

And verdict and judgment was for the plaintiff, upon the ground that as Asa never had any heir male of his body, he had only his life in the estate, and no greater estate passed by his deed.

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**LITCHFIELD COUNTY, AUGUST TERM, A. D. 1781.**

GOODWIN v. HARRISON.

**In an action for giving her a dose, the mother allowed to relate what the plaintiff told the next morning.**

ACTION of the case, for giving her a dose in some toddy, to intoxicate and inflame her passions. On trial upon the plea of not guilty to the jury, the plaintiff's mother was offered as a witness to testify what the daughter's complaints were when she first saw her the next morning, after the affair happened, and what she said about it; this was objected to, as being hearsay from the plaintiff, and therefore not admissible; but by the court, the mother was allowed to relate what the plaintiff

told her the next morning when she first saw her — as being an exception from the general rule, founded upon the necessity of the case.

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**HARTFORD, SUPERIOR COURT, MARCH TERM, A. D. 1783.**

RAY v. BUSH.

**When the grantee prevents his deed from being recorded at length, the record shall not relate back to the time of its being received for record to the prejudice of others.**

ACTION of ejectment, for a tract of land lying in Chatham. Plea not guilty. Issue to the jury.

The case was — On the 2d of May, A. D. 1763, the plaintiff took a deed of said land, of that date, from John Gill who was the owner, and carried it to the town register to be entered upon, received for record, but with orders not to be recorded until further orders; the register received it and entered upon it, "John Ray's mortgage deed from John Gill, June 7th, A. D. 1763 received for record, William Rockwell," and put it away in a private box, where he kept such deeds: In October A. D. 1763 the defendant was applied to by Gill to be surety for him, and for his indemnity, proffered him a deed of said land, and the defendant before he complied, went to the register and searched the records, found no deed to any person, nor was informed of any being lodged there, and being wholly ignorant of said Ray's deed, he became surety for Gill, and for his indemnity took a deed of said land from Gill, dated in October A. D. 1763, and carried it to the register and had it duly recorded. Gill finally failed, and Bush was obliged to pay the debt for which he was surety. In June, A. D. 1764, the plaintiff gave orders to have said deed recorded; and it was then and not before recorded at length.

The defendant offered parol evidence to prove that the plaintiff had been guilty of a fraud, in ordering the deed not to be recorded at the time he left it to be entered upon as aforesaid; also to show how said deed had been kept, and when it was recorded at length. This was objected to, because it would contradict the record.

By the Court — The evidence is admissible.

The defendant then offered the deposition of Titus Hosmer, Esq. who was deceased, given upon a petition to the general assembly, between the same parties, and relative to the same point now in dispute — which was objected against, on the ground that it was taken before this action was commenced, and on a petition in chancery.

By the Court. The deposition was admitted; and upon the evidence the aforesaid state of facts was proved. And verdict and judgment was for the defendant, upon the ground, that although the statute says, that a deed, when recorded at length, the record shall bear the same date as the entry made upon it when it was received for record; yet where a grantee will himself, by orders or otherways, prevent the deed's being recorded at length, the relation between the entry and the recording at length, is destroyed, as to all persons defrauded thereby, and the record bears date at the time when the deed is recorded at length.

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**WINDHAM, SUPERIOR COURT, MARCH TERM, A. D. 1783.**

LUCE V. DIMOCK.

**Lands purchased after making a will pass by it in case of a republication.**

Action of ejectment for a tract of land. The defendant plead in bar, that one Jonathan Luce made and published his

will, at a certain time, which has since been proved and approved; by which he gave all his estate, both real and personal, to his wife Jemima; that the demanded premises was a part of his real estate at the time of his decease, and by force of said will vested in the said Jemima, from whom the defendant derives a title to himself in his plea.

The plaintiff replies, and admits that the demanded premises belonged to said Jonathan, at the time of his decease; yet he says, that the land demanded was purchased by said Jonathan subsequent to his making said will.

The defendant rejoins, and admits that said land was purchased subsequent to the making of said will; yet he says, that after said purchase the said Jonathan repeatedly recognized his said will, and republished the same, by declaring, that he had made his will, which was lodged at Esq. Gray's; and that he had thereby given to his wife, all his estate, both real and personal.

The plaintiff traverses the defendant's rejoinder as to the republication of the will; upon which issue was joined to the jury; and the jury find the facts put in issue, as alleged in the rejoinder of the defendant, and find for him his cost; and judgment was given accordingly.

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**NEW LONDON COUNTY, SEPTEMBER TERM, A. D. 1783.**

KELSY v. WRIGHT ET UX.

**A constable chosen and sworn into office and again rechosen the next year has right to officiate.**

ACTION of trespass, assault and battery, committed by the wife. Plea not guilty. Issue to the jury. The jury find the following facts in a special verdict, viz.

Kelsy v. Wright et ux.

That in December A. D. 1781, the plaintiff was duly chosen a constable by the town of Killingsworth and was sworn into office: That in December A. D. 1782, he was again duly chosen a constable by said town: That on the 15th day of January A. D. 1783, he received a warrant, directed to the sheriff, his deputy, or to either of the constables of said Killingsworth, commanding them to arrest the body of said Wright, and him have before a justice of the peace, to answer to a complaint exhibited against him, for going over to Long Island and having illicit intercourse and commerce with the enemies of this and the United States: That the plaintiff repaired to the dwelling-house of said Wright, and after making known his business and demanding admittance, and being refused by the wife, he broke the door and entered the house, the husband, said Wright, not being there, and the wife committed the facts alleged in the declaration; and that the plaintiff was afterwards, in said month of January sworn as constable for A. D. 1783.

The point about which the jury doubted and referred to the court, was — Whether the plaintiff was then lawful constable and had right to break the door of said house?

And by the Court — The law is so upon the facts aforesaid, that the plaintiff was lawful constable and had right to break open the door and enter said house; and judgment was for the plaintiff to recover; for although said Wright was not in the house, the plaintiff had good reason to suppose he was. A constable being an annual officer, and the plaintiff being duly chosen and sworn constable in December A. D. 1781, and re-chosen again in December A. D. 1782, he continued a lawful constable, although he was not sworn again until afterwards. 1 Strange, 625, Foot v. Prows.

This judgment was affirmed in the Supreme Court of Errors.

**HARTFORD COUNTY, ADJOURNED SUPERIOR COURT, NOVEMBER TERM, A. D. 1783.**

MARSH v. DEMING.

**The plaintiff upon a reversal, must enter his action at the same court.**

WRIT OF ERROR, to reverse a judgment of the County Court in action brought by Deming v. Anne Marsh, upon a note dated the 8th of October A. D. 1777, for £42 10s. 3d. lawful money, payable in one year with interest, on which was indorsed, July 6th A. D. 1778, £40 16s. lawful money; and by the pleadings it appeared to have been paid in continental bills. The County Court sealed the indorsement and gave judgment for the remainder of the note. This was assigned for error, and the judgment was reversed; because the indorsement ought to have been applied nominally. Deming omitted to enter his original action upon the reversal, until the term was ended; and at the next Superior Court moved for liberty to enter it, and being objected to; the court determined that it was too late, and ought to have been entered at the same court the reversal was.

BROWN v. TALCOTT.

**A sum paid on account of a note and not applied, recovered back in an action of book-debt.**

ACTION on book for 204 continental dollars, paid to the defendant, who was son of Colonel Samuel Talcott, and his clerk, on account of a note which the plaintiff owed to said Colonel Talcott; and which had not been applied on the note; the plaintiff was admitted to his oath upon his book and recovered the sum demanded.

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**WINDHAM, ADJOURNED SUPERIOR COURT, DECEMBER, A. D. 1783.**

COUNTY TREASURER v. BISSEL.

**In a bond for prosecution, the imprisonment of the principal will not exonerate the bail.**

SCIRE FACIAS on a bond for prosecution, given by said Bissel upon praying out a writ, in which one Robbin a negro man

was plaintiff; setting forth in the *scire facias*, the judgment and execution recovered against said Robbin for cost; and also a commitment of said Robbin to gaol on said execution, and that he had taken the poor prisoner's oath, and gone out.

To this declaration a demurrer was given, and the judgment of the court was — That the declaration is sufficient, for the bond given for prosecution at the praying out of a writ, is to secure to the defendant his cost, and nothing but actual payment of the cost will exonerate the bondsman.

### Arnold v. Sergeant.

**A plaintiff may amend his writ by striking out one of the plaintiffs.**

Action for setting a fire in his own land, and suffering it to run into the plaintiffs and burn up their fences, timber, etc.

The defendant plead in abatement — That Amos Arnold one of the plaintiffs was an alien enemy, etc. which plea was judged sufficient. Upon which Nathan Arnold, the other plaintiff paid the cost, and moved to amend his writ by striking out the name of Amos Arnold; which was allowed by the court.

### Hannaball v. Spalding.

**A new trial cannot be granted in a *qui tam* action as to the civil part only without the other.**

Writ of Error to reverse a judgment of the County Court, in a *qui tam* prosecution, brought by said Spalding against said Hannaball before a justice, for stealing a handkerchief of the value of seven shillings; and of which said Hannaball was convicted before the justice; and appealed to the County Court; and before the County Court he was acquitted. Spalding afterwards brought a petition for a new trial; on the ground of having discovered new evidence; upon which the County Court granted a new trial in said cause as to the civil part only; and upon the new trial Hannaball was found guilty, and the handkerchief judged to be of the value of five shillings;

and the court gave judgment for the plaintiff to recover fifteen shillings lawful money the three fold damages, and his cost taxed at £9.

Errors assigned are — 1st. That said County Court ought not to have granted a new trial; it being a criminal prosecution. 2d. That no new trial could be granted as to one part of the suit without the other. And, 3d. That said County Court erred in rendering the final judgment in said cause. Plea nothing erroneous.

Judgment manifest error. Upon the ground that a new trial is not to be granted, in a criminal cause, to a prosecutor, unless the acquittal was procured by some fraud or malpractice. That a new trial cannot be granted as to one-half of a prosecution, and not the other.

### Badcock v. Steadman.

**A note cannot be an escrow delivered directly to the promisee.**

Writ of Error to reverse a judgment of the County Court, in an action brought by Steadman against Badcock upon a note.

To which Badcock plead in bar — That he and the plaintiff were traders in company, and upon a settlement, it was agreed between them, that he should take all their company accounts and credits to himself, and collect them for his own use; and that he should give said Steadman therefor, the note on which, etc. and that the note on which, etc. was executed and delivered to said Steadman upon this express agreement and condition, viz. that the plaintiff should deliver to the defendant all the company papers and accounts, and that said note should not be of force, nor be operative as his note, until he should have time sufficient to collect said debts in order to pay it; and avers that he has not had sufficient time to collect said accounts and debts, etc.

To this plea in bar, the plaintiff demurred; and judgment was — That the plea is insufficient; and the judgment of the

County Court was affirmed upon the writ of error. For a parol condition cannot be set up to control a written security executed and delivered to the party himself.

ALLIN v. HISCOCK.

**On *nul tiel* record, plead — the court ordered the original record of the justice to be produced for inspection.**

WRIT OF ERROR, to reverse a judgment of a justice.

The defendant plead — That there was no such record as set forth in the writ of error — the plaintiff replied that there was; and prayed the inspection of the record — the plaintiff then produced a certified copy from the justice in proof of the record; and the defendant produced also a certified copy from the same justice, which was different; upon which the court sent to the justice to bring his original record, in order for inspection; upon which it appeared there was no such record as set forth in the writ of error, and judgment was accordingly, and that the writ abate.

FITCH, JUDGE OF PROBATE, v. LOTHROP ET AL.

**In an action on a probate bond the breach must be directly and positively averred.**

ACTION upon the administration bond, given for said John. In the declaration the penal part and the condition of the bond were set forth, with an averment; that the defendants had never paid said penalty, nor performed the condition of said bond.

To this declaration the defendants demur — And the following exceptions were taken; 1st. That a bondsman is not liable; unless the administrator has committed a *devastavit*, and in some point been deficient in his duty; and that this ought to appear from the declaration. 2d. The averment is that the defendants have never performed the conditions of said bond; which is a negative pregnant, for the administrator may have performed the conditions; although the defendants have not. Judgment that the declaration is insufficient.

**WINDHAM COUNTY, MARCH TERM, A. D. 1784.**

OSGOOD V. GROSVENOR.

**The public and not the commissary who purchased for their use, is indebted for provision bought by him.**

ACTION on book for a pair of oxen. Plea owe nothing. Issue to the court.

The case was — The defendant was a deputy commissary of purchases; and as such, applied to the plaintiff and bought these oxen; and sent them on to the army.

The question was — Whether the defendant or the public, whose agent he was, is indebted for these oxen? By the court, the defendant owes the plaintiff nothing by book, for the defendant acted as servant to the public in the purchase of said oxen, and was known to the plaintiff to be such when the credit was given.

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**NEW LONDON COUNTY, MARCH TERM, A. D. 1784.**

HILLYARD V. SEAMONS.

**In a petition for a new trial the witnesses must be named.**

PETITION for a new trial. In this case it was determined by the court — That the new evidence, must be particularly set forth, and the names of the witnesses; or they may not be admitted, except it be, to the same point, to which others named, are adduced.

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**NEW HAVEN COUNTY, AUGUST TERM, A. D. 1784.**

IVES V. GILBERT, EXECUTOR TO DORMAN.

**A promise to pay for boarding a son two years, not within the Statute of Frauds, etc.**

ACTION of assumpsit, upon a parol promise made by said Dorman in his lifetime, to pay the plaintiff for boarding his

son two years; while he should live with the plaintiff, as an apprentice, to learn the practice of physic; and avers that he boarded said son two years as aforesaid, and that he had never been paid, etc.

The defendant plead in bar — The Statute against Frauds and Perjuries, and averred, that said promise was not to be performed within one year from the making of it; and that there was no note or memorandum made of said promise in writing.

The plaintiff demurred to the plea in bar — And the judgment of the court was, that the plea in bar is insufficient: For the consideration had continuance to the end of the two years; and it is a contract executed on the part of the plaintiff, and so not within the statute.

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**HARTFORD COUNTY, SEPTEMBER TERM, A. D. 1784.**

STATE v. HURLBUT.

**Where on a criminal prosecution the defendant is out upon bail, the court will not receive the verdict, unless he appears.**

INFORMATION for counterfeiting money; trial to the jury, and the defendant was out upon bail: The jury returned into court with their verdict, and the defendant being called did not appear: The question was, whether the court would receive the verdict. By the court, the defendant must appear, or there will be no propriety in receiving the verdict.

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**NEW LONDON COUNTY, SEPTEMBER TERM, A. D. 1784.**

HUNTINGTON v. LOTHROP, DEPUTY SHERIFF.

**A sheriff may be sued out of his county, and before another court than that which granted the execution.**

WRIT OF ERROR to reverse a judgment of the County Court, in an action brought by said Huntington against said Lothrop;

declaring that he recovered a judgment and execution before the County Court in the county of Windham against for £ lawful money, that he delivered said execution to the defendant, who then was a lawful deputy of the sheriff of Windham county, to levy and collect; as by the defendant's receipt ready to be shown in court appears, etc. and averred that the defendant had not levied and collected said execution, etc.

The defendant plead in abatement — That said execution was granted on a judgment of the County Court in the county of Windham; and that he is liable to be sued only before the County Court in the county of Windham; and that the County Court in the county of New London hath not jurisdiction of said action.

A demurrer was given to the plea — And by the County Court the plea was judged to be sufficient. And upon the writ of error the judgment was reversed by the Superior Court, upon the ground that this is an action at common law, and not upon the statute.

### Carey v. Prentice.

**Action of *indebitatus assumpsit* lies for money paid upon an illegal consideration.**

Action of *indebitatus assumpsit* for money had and received for the plaintiff's use. Plea nonassumpsit. Issue to the jury.

The case was — In December A. D. 1780 the defendant was commandant of the fort at New London; and the plaintiff was going out with his vessel, loaded with oats; having the governor's permit to transport them to Newport, but had not given bond agreeable to the statute; the defendant seized the vessel and cargo; upon which the plaintiff gave the defendant £145, to let him pass; which the defendant received and permitted the plaintiff to pass without giving bonds. Verdict and judgment was, for the plaintiff to recover, being money

paid upon an illegal consideration, and which the defendant had no right to hold or retain.

HARTSHORN v. HALSEY.

**In an action by an officer against a receipts-man for property taken on execution, it is not necessary to aver, that the judgment is unsatisfied.**

WRIT OF ERROR, to reverse a judgment of the County Court in an action, brought by Hartshorn against Halsey; declaring that at a certain time, he had a certain execution as an officer, to levy and collect; that he levied it upon a horse, the property of the debtor, and posted it as the law directs; that upon the request of the defendant, he delivered said horse to him to keep, in consideration whereof, the defendant agreed and promised to redeliver said horse to the plaintiff on the day of etc. as by the defendant's receipt ready to be produced in court appears; and that the defendant disregarding his promise, hath never redelivered said horse, etc.

To this declaration the defendant demurred; because there is no averment, that said judgment and execution remain in force, unreversed and unpaid. The County Court judged said declaration to be insufficient; which judgment was reversed by the Superior Court upon the writ of error; because those averments are unnecessary in the declaration, in an action brought by an officer against the receiver of property taken by execution.

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## NEW HAVEN COUNTY ADJOURNED SUPERIOR COURT, A. D. 1784.

ARABAS v. IVERS.

**A person illegally imprisoned may be discharged upon a *habeas corpus*.**

THE case was — Jack was a slave to Ivers, and enlisted into the continental army with his master's consent — served dur-

ing the war, and was discharged. Ivers claimed him as his servant; Jack fled from him to the eastward, Ivers pursued him, and took him and brought him to New Haven on his return to New York, where he belonged, and for safe-keeping while he stayed at New Haven, he got the gaoler to commit Jack to prison; and upon Jack's application to the court, complaining of his being unlawfully and unjustly holden in prison, the court issued a *habeas corpus*, to bring Jack before the court; also ordering the gaoler to certify wherefore he held Jack in prison; which being done, Ivers was cited before the court; and upon a summary hearing, Jack was discharged from his imprisonment, upon the ground that he was a freeman, absolutely manumitted from his master by enlisting and serving in the army as aforesaid.

PRUDEN ET AL. v. NORTHRUP.

**A new trial granted to the prosecutor, where the acquittal was procured by imposition and fraud.**

WRIT OF ERROR is brought to reverse a judgment of the Maritime Court in granting a new trial upon the petition of Northrup v. Pruden, etc. alleging that he seized and libeled a certain vessel and cargo, belonging to them, for contravening the Embargo Laws; and that upon trial the vessel and cargo was acquitted: That he has since discovered that one Helms, who was the principal witness for the claimants, and by whose testimony the vessel, etc. was cleared, was interested in the vessel and cargo, and really swore for himself; to which petition a plea in abatement was given, that this is a prosecution of a criminal nature, and no new trial ought to be granted in favor of the libellant; that the plea was judged insufficient; and on a hearing upon the merits, a new trial was granted, and the vessel, etc. finally condemned. Error assigned is, that said plea in abatement ought to have been judged sufficient.

By the SUPERIOR COURT. There is nothing erroneous in the judgment complained of; the concealment of Helms' interest,

and producing him as a witness, whereby the acquittal was procured, was a fraud and imposition, not only upon the libellant, but upon the law and upon the court, for which cause a new trial ought to be granted.

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**WINDHAM COUNTY, ADJOURNED SUPERIOR COURT, JANUARY, A. D. 1785.**

LITTLE v. FOWLER, ADMINISTRATOR OF WARNER.

Where the security for a debt was adjudged void at law, chancery decreed a payment of the debt.

WRIT OF ERROR, to reverse a decree in chancery of the County Court, on a petition brought by said Fowler v. Little; showing that said Warner was bound for Little's debt in the state of New York, and had suffered and paid £100, and was holden to pay 10 per cent. interest on said debt; and that said Little to reimburse and indemnify said Warner, gave him his note for said sum, and wrote it for 10 per cent. interest; that said Warner being informed that 10 per cent. was unlawful interest and would destroy his note, he caused the 10 per cent. to be altered to 6 per cent. and that upon the death of Warner said Fowler was appointed his administrator; that he sued said Little upon said note and that he had avoided said note, by proving it had been altered by said Warner since it was executed, and that he is remediless at law, and prays that said Little be decreed to pay the principal and lawful interest of the sum which said Warner had suffered and been obliged to pay, on account of his being bondsman for said Little as aforesaid.

The County Court heard the petition and granted the prayer, and decreed payment to be made of the principal and the lawful interest, and granted an execution for the same.

Error assigned is — That a Court of Chancery ought not to interpose to grant relief, upon a note rendered void at law, by the party's own wrongdoing.

Judgment of the County Court was affirmed in the Superior Court; and afterwards it was carried by a writ of error to the Supreme Court of Errors, and the decree was affirmed there.

WELLES v. FANING, ADMINISTRATOR OF HOLABURT.

**An administrator cannot compel a creditor to take the land of the deceased, upon execution.**

SCIRE FACIAS. The administrator plead that he tendered lands of said deceased to the officer who had said execution, to be taken and appraised off, in satisfaction thereof, to a much greater value than said debt, which both said officer and the creditor refused to accept. To this plea a demurrer was given.

And judgment — That the plea is insufficient; for an administrator cannot compel a creditor to take the lands of the deceased in satisfaction of his debt.

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**FAIRFIELD COUNTY, FEBRUARY, A. D. 1785.**

KETCHUM v. SCRIBNER.

**A note given for a consideration which is against law, may be avoided.**

ACTION on note, for £28, etc. dated in A. D. 1781. To which the defendant plead in bar, that in A. D. 1776 the plaintiff went to Long Island and joined the enemy; and that in A. D. 1781 he purchased and received of the plaintiff, at Lloyd's Neck, a place within the enemies' lines, on Long Island, a parcel of goods to import into this state, contrary to law, and which goods were imported into this state accordingly, and said note was given for said goods and for no other consideration. The plaintiff replied that said note was given for value received, as expressed and acknowledged in said note — To which the defendant demurred.

And judgment of the court was — That the reply of the plaintiff is insufficient.

**NEW HAVEN COUNTY, FEBRUARY TERM, A. D. 1785.**

PHELPS v. EDWARDS, ADMINISTRATOR ON THE CONFISCATED ESTATE OF B. ARNOLD.

**No appeal lies for a creditor whose claim is disallowed by commissioners on an insolvent estate.**

APPEAL from probate. The case was — Said estate was represented insolvent, and commissioners appointed to receive and examine the claims of the creditors; Phelps had a claim against said Arnold's estate, and exhibited it to the commissioners; the commissioners disallowed the claim, and made return to the Court of Probate; which return of said commissioners was accepted by the court. Phelps takes an appeal from the determination of the Court of Probate in accepting said return; and assigns for reasons, that he had a just claim against said estate, which he exhibited to said commissioners, and that they disallowed it, whereas it ought to have been allowed.

The appellee plead in abatement — That by the statute in such case provided, the doings of commissioners and their disallowance of a claim, is final and conclusive against creditors, and that neither the Court of Probate, nor this court, hath right or power to examine after them, nor to set aside their doings merely because the commissioners have disallowed the claim. To which the appellant demurred.

And judgment — That the plea was sufficient.

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**HARTFORD SUPERIOR COURT, MARCH TERM, A. D. 1785.**

ALLIN ET UX. v. BUNCE.

**A devise to a man and the heirs of his body lawfully begotten forever creates a fee-tail.**

ACTION of ejectment for a piece of land. The case from the declaration and pleadings was thus — Capt. Knowles of

Hartford, in and by his last will and testament, dated the 30th of November A. D. 1753, devised certain lands, including the demanded premises, to his son Samuel and to the heirs of his body forever. The testator died and his will was proved and approved. Samuel Knowles, the devisee, married and had heirs of his body, the plaintiff's wife being one, and then said Samuel sold and conveyed the estate in fee to the defendant, and is since dead.

The question made in this case was — Whether this was a fee conditional in Samuel the son, or a fee-tail.

By the court it was adjudged to be a fee-tail in Samuel the son, and the plaintiff had judgment for the land demanded.

The case of John Kimberly v. Hale, adjudged at Hartford on a special verdict, was quoted, in which case the jury found the following facts in a special verdict, viz. That in April A. D. 1727, Samuel Smith, Sr. made a settlement of his estate to certain uses, viz. first to himself for life, then to his son Samuel and the heirs of his body lawfully begotten; and in default of such heirs to his son Joseph and the heirs of his body lawfully begotten; and in default of such heirs then to his own right heirs. That Samuel, Sr. died, and Samuel the son entered into said estate and was seized; and without having any heirs of his body, in A. D. 1734 he conveyed said estate to his sister Rachel; that thereupon said Rachel entered and was possessed, and under her the plaintiff claims. That in A. D. 1749 Samuel the younger died without heirs of his body, and that thereupon the said Joseph Smith, entered upon the estate, claiming the same as tenant in tail by force of the deed of settlement aforesaid, and leased it to the defendant for a term not yet expired; who entered and did the facts complained of in the plaintiff's declaration.

And thereupon put the question of law to the court upon the facts aforesaid — Whether the said Joseph Smith and the

defendant under him, had right to enter into said land, etc. The court adjudged that the said Joseph Smith, and the defendant under him, had right to enter into said land; and thereupon, judgment was for the plaintiff to recover.

The principal case of Allin and Bunce was carried by a writ of error, to the Supreme Court of Errors, and the judgment of the Superior Court was affirmed.

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**WINDHAM COUNTY, MARCH TERM, A. D. 1785.**

CARPENTER v. CRANE.

**A note given on Saturday night is good.**

ACTION on a note, dated the 29th of December. The defendant plead in bar, that said note was executed on the 30th of December which was Sunday or Lord's day, and not on the 29th of said December the day it bears date.

The plaintiff replied, that the defendant's brother was pursued and arrested by the plaintiff for a theft, charged to have been committed on Saturday the 29th near night, and the plaintiff was about to have him committed to goal, when the defendant interposed for the relief of her brother, and a negotiation for a settlement commenced between the parties, and continued until about two o'clock on Saturday night, when it was completed, and the note was then executed and given to the plaintiff, in satisfaction of the damages and cost, and to procure the release and discharge of her said brother — without that, that said note was executed and given on the 30th of said December which was Lord's day. Demurrer.

Judgment — That the reply of the plaintiff is sufficient and for the plaintiff to recover; for that said note was given in the night season preceding the Sabbath, when there is no law

which expressly forbids it, or that declares such note to be void — and in this particular case, it appeared to be an interference to prevent the imprisonment of the brother.

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**HARTFORD COUNTY, SEPTEMBER TERM, A. D. 1785.**

MILLS V. BORROUGHS.

**An arbitration note for £10 not cognizable by a single minister of justice.**

A WRIT OF ERROR, complaining of a judgment of a justice in an action, brought by said Borroughs against said Mills, upon a note for £10 lawful money and witnessed by two witnesses. To which said Mills plead in abatement, that said note was executed and delivered into the hands of certain arbitrators, to hold and deliver to said Borroughs, upon condition they made and published their award upon certain matters submitted, and he failed to abide it, to compel him to perform the same; and that said note is not for money only, as it purports to be on the face of it, and that the same is not cognizable before a single minister of justice, but before the County Court. Demurrer.

Judgment — That the plea is insufficient, and that the defendant answer over to the action; and afterwards judgment was rendered by said justice for said Borroughs upon the merits.

Error assigned is — That said justice ought to have judged said plea in abatement, sufficient.

Judgment of the court — That there is manifest error in the judgment complained of; for arbitration notes are considered as obligations, given to compel the promisor to perform the award, that shall be made, by the arbitrators, and is suspended upon that condition; and the sum awarded and interest, is the rule of damages.

**NEW LONDON COUNTY, SUPERIOR COURT, SEPTEMBER, A. D. 1785.**

ISHAM, ADMINISTRATOR ON THE ESTATE OF BENJAMIN FITCH, v. AVERY.

**A deed, etc. of land, of which the grantor is disseized, is to every purpose null and void.**

ACTION of ejectment, for a piece of land that belonged to Benjamin Fitch, deceased, whose estate was insolvent; declaring that said land was ordered by the Court of Probate to be sold for the payment of said Fitch's debts, and that the defendant had wrongfully entered into the possession of it, and disseized the plaintiff thereof and still held the possession thereof against law and right.

The defendant plead in bar — That the plaintiff as administrator aforesaid, pursuant to an order of the Court of Probate, sold said land to Daniels, and by deed, dated the day of duly executed, acknowledged and recorded, did grant, bargain and sell said lands to said Daniels, for the consideration of and in and by said deed, did covenant to warrant said lands to said Daniels against all claims and demands in the law whatever, and that thereby the plaintiff is estopped and debarred of demanding and recovering said land against his own deed and warranty aforesaid.

The plaintiff replied — That true he did execute said deed to said Daniels as aforesaid; yet he says, that at the time of executing said deed aforesaid, to said Daniels, he the plaintiff was disseized of said land by the defendant, and ousted of the possession; and that the said Daniels was not in possession, and by the statute of this state made to prevent the selling of disputed titles, said deed is utterly void and of no effect, and was so adjudged by the Superior Court, in an action of ejectment brought by said Daniels against the defendant to recover said land.

To this replication a demurrer was given, and judgment — that the reply is sufficient; for that said deed is void by the statute in every part, and to every intent and purpose.

WORTHINGTON v. HOLLISTER.

**An execution returnable according to law, runs to the next court, which is sixty days or more from the date of the execution.**

ACTION of assumpsit; declaring, that on the 11th of December A. D. 1782, the plaintiff being a deputy sheriff, had in his hands an execution in favor of John Dishon v. John Welles, dated the 4th of October A. D. 1782, and made returnable according to law, which execution issued on a judgment of the County Court, in the county of New London. That on said 11th of December A. D. 1782 he levied it on a quantity of salt, the property of said Welles, which the plaintiff delivered to the defendant at his store to keep and redeliver, at the end of twenty days, at which time he had posted it for sale: And that in consideration thereof, the defendant assumed and promised to deliver said salt to the plaintiff at the end of twenty days, etc. which he never did, etc.

Plea, nonassumpsit. Issue to the jury. It appeared that the next County Court, after the date of the execution, in the county of New London, sat on the fourth Tuesday of November A. D. 1782.

The defendant insisted that the return day of said execution was passed, at the time when it was levied, and that it had become of no force; and that the plaintiff acted without authority and was a trespasser.

The court agreed and determined — That after the return day of an execution is expired, an officer has no right to levy; but the court observed, that the statute required that executions should be made returnable within sixty days or to the next court, if there are sixty days to the next court — that when an execution is prayed out within sixty days of the next court, and made returnable according to law, it is returnable to the next court which hath sixty days from the date of the execution and the session of the court, which will make this execution returnable to the County Court in June A. D. 1783 — further, the officer is responsible at all events for the salt.

And verdict and judgment was for the plaintiff.

BUTLER v. BISSEL.

**Bail exonerated by a final judgment in favor of the defendant, although such judgment be afterwards reversed for error.**

SCIRE FACIAS, on special bail given for one Wales, by the defendant; setting forth the action and the bond, that said cause was appealed into the Superior Court; when and where upon a demurrer to the declaration, judgment was given for the defendant said Wales; which judgment was afterwards reversed upon a writ of error by the Supreme Court of Errors, and sent back to the Superior Court; and that said Superior Court gave judgment for the plaintiff said Butler to recover of said Wales £ damages, and cost; for which he had an execution and delivered it to a lawful officer, who made return thereof with *non est inventus*, indorsed thereon, and that the debtor said Wales, was gone out of the country, praying for remedy against the bondsman, etc.

The defendant plead in bar — The first judgment which was rendered in the Superior Court in favor of said Wales, that the same was a final judgment in said cause, and that the defendant was thereby wholly discharged and exonerated from his said bail bond.

Plaintiff replied — That said judgment was reversed by the Supreme Court of Errors, and that there was no such record and judgment existing and in force, as the defendant had alleged in his plea in bar.

To this reply the defendant demurred.

Judgment — That the reply of the plaintiff is insufficient, upon the ground that the bail was discharged and exonerated, by the first judgment in the Superior Court; notwithstanding it had been reversed for error in the Supreme Court of Errors.

This determination of the Superior Court was afterwards affirmed, upon a writ of error by the Supreme Court of Errors.

PONDERSON v. MRS. AVERY, ADMINISTRATRIX ON HER HUSBAND'S ESTATE.

**Creditors barred of their claims by the disallowance of commissioners.**

ACTION of book-debt, for a debt due from said deceased.

Plea in abatement — That the estate of said deceased was represented insolvent, and commissioners were appointed; and that the plaintiff exhibited to them, the demand on book for which this action is brought, and was by said commissioners examined and disallowed.

The plaintiff replied — That said deceased's estate is not insolvent, but sufficient to pay all the debts; and the defendant demurred to the reply — Judgment that the reply of the plaintiff is insufficient.

This judgment was afterwards affirmed in the Supreme Court of Errors. Upon the principle that the creditors must be concluded, as to their claims by the report of the commissioners; whether the estate turns out to be insolvent or not; for otherways the settlement of estates would be greatly delayed, if not wholly prevented; and executors and administrators be exposed to great risk and damage.

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**HARTFORD COUNTY, ADJOURNED SUPERIOR COURT, NOVEMBER, A. D. 1785.**

PRENTICE v. PHILLIPS.

**Action of debt on book lies for money paid on a note that has not been applied.**

ACTION of book-debt. Plea owe nothing. Issue to the jury.

The plaintiff's book consisted of a charge for £200 hard money paid to the daughter of the defendant in May A. D. 1776, on account of a note, in favor of said Phillips, which had not been applied.

The defendant objected against said book being given to the jury, and also against the plaintiff's being admitted to swear to it; as it would be the same in effect as admitting the plaintiff to swear to a payment made of that sum upon his note — the court ruled the objections to be insufficient, and the plaintiff was admitted and sworn to his book, and recovered the demand.

KING v. LYMAN, EXECUTOR DE SON TORT OF GENERAL LYMAN, DECEASED.

**Intermeddling with the real estate or goods, etc. conveyed by a fraudulent bill of sale of a deceased person, will not subject a man as executor *de son tort*.**

ACTION of account brought against the defendant as executor aforesaid.

The defendant plead — That he was not, nor ever had been executor of the last will, etc. of said Phinehas Lyman deceased, nor had he ever administered as such. On which the parties were at issue to the jury.

The plaintiff offered evidence to prove that certain lands which were the property of said deceased, at the time of his death, had been taken and disposed of by the defendant: Also, that the defendant had taken and disposed of certain goods and chattels which were held under a fraudulent bill of sale, given of them by the deceased in his lifetime; which evidence was objected to by the defendant.

And by the COURT. The evidence is irrelevant, for no intermeddling with the real estate of the deceased will make the defendant an executor *de son tort*. Nor will his holding and disposing of goods and chattels, conveyed by the deceased in his lifetime; although the bill of sale of them was fraudulent; for though the bill of sale may be fraudulent as to creditors, it is good and valid between the parties, and upon these principles all evidence of this kind was excluded.

**HARTFORD COUNTY, MARCH TERM, A. D. 1786.**

GAY ET AL. v. ADAMS, BATES ET AL.

**A Court of Chancery will relieve against accidents, and a title defective at law, if justice requires it.**

PETITION in chancery. The case was — Pelatiah Adams late of Suffield deceased, owned a tract of land lying in common with a lot which belonged to his wife; that the said Pelatiah died; his wife took administration upon his estate; which was represented and found to be greatly insolvent. That she afterwards intermarried with one Darius Pinney, whereby he became administrator in her right; they then joined in a deed of the land which belonged to the deceased, and of the land which belonged to the wife, to Nehemiah Strong for a valuable consideration; this deed was not signed by them as administrators. Strong sold and conveyed said lands for a valuable consideration to the petitioner, who went into the possession: And after a number of years had elapsed, the children and heirs of said Pelatiah, brought an action of ejectment against the petitioner, for the land which belonged to their father; and in a trial at law before the Superior Court, they recovered judgment for the same, upon the ground that the deed from said Pinney and wife the administrators, to said Strong, did not pass the title; because no order from the Court of Probate to them to sell said land, could be produced or found; that after the recovery at law aforesaid, Lemuel Bates, who was perfectly acquainted with the situation and circumstances respecting the title to said land; and also that the petitioner meant to pursue the matter further; applied to said heirs and took a deed of it: and prays that said Bates in whom the legal title now is, may be ordered and decreed to release the same to the petitioner.

Four objections were made to the granting of this petition — 1st. That Pinney and wife did not sign and execute said deed to Strong, as administrators. 2d. That there was no order of probate to them to sell. 3d. That the heirs of said

Pelatiah having recovered said land at law, a Court of Chancery will not interpose and take it from them. 4th. That Lemuel Bates since the recovery at law aforesaid, had purchased it for a valuable consideration, and taken a deed of the same from said heirs.

To which it was answered by the petitioner — That said deed conveyed all the right which said Pinney and wife had, either in virtue of their interest or their authority. 2d. That it is the province and duty of a Court of Chancery to relieve against accidents, to aid defective titles; and to enforce the doing of substantial justice. 3d. That said recovery at law was against equity, and by reason of a defect in the petitioner's law title; arising from the accident of the Court of Probate's having omitted to give an order to sell said land, or of said orders having been misplaced or lost. 4th. That said Bates was a purchaser with notice of all the circumstances attending said title.

The court granted the petition, and ordered said Bates to release said land to the petitioner, under a penalty.

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**WINDHAM COUNTY, MARCH TERM, A. D. 1787.**

JONES V. ABBEE, SHERIFF.

**A prisoner's going out of prison, who is upon bonds, is a negligent escape.**

ACTION for the escape of Reuben Huntington. Plea not guilty. Issue to the court.

The case was — Huntington was imprisoned on an execution in favor of Jones, and had the liberty of the yard upon bonds; in the night he privately went out of the limits of the yard, and returned again before morning, within the limits, unknown to the sheriff: Afterwards he took the poor prisoner's oath; upon which Jones moved to the County Court, and had him assigned in service; which assignment upon a writ of error was reversed in the Superior Court. Jones after all this, found out that Huntington had been out of the limits

of the prison in the night aforesaid; brought this action for the escape, and on the plea of not guilty, issue to the court; the court found that the defendant was not guilty; upon the principle, that Huntington's going out of the limits of the yard aforesaid, was a negligent escape, and that upon his return to prison, it was lawful for the sheriff to retake and hold him, and which had in fact been done, and the plaintiff had suffered nothing thereby.

HOWARD v. LYON.

**A prisoner upon an execution who escapes, may be retaken at any place.**

ACTION of false imprisonment. Issue to the jury.

The case was — The defendant was a constable of the town of Woodstock, and had an execution against said Howard, and took him by it; Howard escaped from him, and went to Providence, in the state of Rhode Island; Lyon applied to a justice of the peace, and got an escape warrant, to retake him; Lyon pursued Howard, and got his warrant renewed in Rhode Island, retook him, and committed him to the keeper of the gaol in Windham; and for that this action is brought.

Verdict and judgment that the defendant is not guilty — For an officer has right to pursue and retake his prisoner, wherever he can find him.

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**HARTFORD COUNTY, MARCH TERM, A. D. 1788.**

HITCHCOCK v. GRANT.

**It is requisite, in order to recover maintenance for a bastard child, upon the statute, that the mother charge the man in the time of her travail.**

WRIT OF ERROR, to reverse a judgment of the County Court, in a prosecution for maintenance of a bastard child, brought by said Hitchcock v. Grant upon the statute. The defendant plead in bar, that the complainant had not been constant in her accusation of said Grant, and that she did not accuse him of being the father of said child in the time of her travail.

The plaintiff admitted in her reply, that she did not, and assigned some reasons why she did not. To which a demurrer was given; and the County Court judged the reply to be insufficient.

Error assigned — That said County Court ought to have judged said reply sufficient.

And the judgment of the County Court was affirmed by the Superior Court; upon the ground that the statute makes her charging the man in the time of her travail an essential requisite, in order to the plaintiff's having or maintaining her suit upon the statute for the maintenance of a bastard child.

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**HARTFORD COUNTY, SEPTEMBER TERM, A. D. 1788.**

TUTTLE v. BIGELOW.

**Forbearance a good consideration of a promise to bind the promisor in a note to pay the money to the assignee, notwithstanding a discharge from the promisee who is bankrupt.**

WRIT OF ERROR, to reverse a judgment of the County Court, in an action of assumpsit, declaring, that for a valuable consideration, one S. Crow assigned to him a note against said Bigelow for a quantity of rum, to be delivered at New Haven some time in February; that when said note became due he applied to the defendant for the pay, and informed him of said assignment; and the defendant, not then having the rum, requested the plaintiff to wait on him until June then next, to receive the rum at Hartford, to which proposal and request of the defendant the plaintiff consented and agreed; and the defendant then and there in consideration thereof assumed and promised to pay and deliver said rum, due on said note to the plaintiff, at Hartford aforesaid, on the day of June aforesaid; which promise the defendant hath never performed, but to defraud the plaintiff hath since his said promise, obtained from said Crow a discharge of said note, who then was and now is a bankrupt and well known to be such by the defendant — damage, etc.

Plea, nonassumpsit; and verdict for the plaintiff. And the defendant moved in arrest; the insufficiency of the

declaration — and judgment was arrested by the County Court.

Error assigned — That the County Court ought not to have arrested said judgment; for that said declaration was sufficient.

And the judgment of the Superior Court is — That there is manifest error in the judgment complained of, for the agreement to give forbearance to June, and to accept the rum at Hartford, on the request of the defendant, is a good consideration of the promise.

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**WINDHAM COUNTY, SEPTEMBER TERM, A. D. 1788.**

PAYNE ET AL. V. BACON.

**Where a town is sued before a justice they must have twelve days' notice.**

ERROR to reverse a judgment of a justice in an action brought by Bacon against Payne, and the rest of the inhabitants of the town of Canterbury: The writ was served only six days before the court.

Plea in abatement — That by law said writ ought to have been served twelve days before the sitting of said court. The justice judged the plea insufficient; and on the merits gave judgment for the plaintiff.

Error assigned — That said plea in abatement ought to have been judged sufficient.

Judgment — manifest error, upon the ground that the statute requires, that twelve days' notice should be given.

BUGBEE V. ABBOT.

**An appeals lies from a judgment given upon *nihil dicit.***

WRIT OF ERROR to reverse a judgment of a justice, in an action brought by Abbot v. Bugbee. The defendant appeared and refused to plead; and judgment was given against him upon *nihil dicit;* the defendant moved for an appeal to the County Court, the cause being appealable, and the justice denied an appeal, because he did not plead; this was assigned for error; and the judgment was reversed, for the defendant was in court and an appeal ought to have been granted.

**SUPREME COURT OF ERRORS, OCTOBER, A. D. 1789.**

FITCH v. HAMLIN.

**In a loan of final settlement notes, an agreement to secure the repayment of said final settlements at a future day, in notes of the same tenor, date and value, with the lawful interest; and to give a note for a further sum in good money for the loan of said final settlements, is a corrupt agreement and will render both notes given in pursuance of such agreement usurious, and void by the statute.**

ERROR to reverse a judgment of the Superior Court rendered at Windham, March term, A. D. 1787; reported in Kirby, page 260; which judgment was reversed for the following reasons, viz.

Hamlin sued Fitch upon a note given by Fitch and Campbell on the 1st of March 1784, for $16,839 16-90 in final settlement notes, received to be repaid in notes of same tenor, dates and value, in six months and lawful interest.

In bar of which action, the defendant plead the statute against taking unlawful interest, and that more than lawful interest was included in and secured by said note by the corrupt agreement of the parties, etc. upon which the parties were at issue to the jury — who found the following verdict, viz.

Hamlin v. Fitch. In this case the jury find, that on the day of the date of the note on which, etc. it was corruptly agreed, by and between the plaintiff and said Campbell and the defendant; that said Campbell and the defendant, should execute the note on which, etc. to the plaintiff; and it was also agreed, that said Campbell should give to the plaintiff his note for $1,000 lawful money, for the loan, interest and forbearance of the sum loaned and secured in the note on which, etc. for the term of six months, over and above the lawful interest; and that the defendant and said Campbell did in pursuance of said corrupt agreement, and as part and parcel of the same, contract, make and execute to the plaintiff the note on which, etc. and the said Campbell did make and execute his note to the plaintiff for the sum of £300 payable

in six months; and that there is included in and secured by said two notes, the sum of $1,000 in silver, for the loan, interest and forbearance of $16,839 16-90 dollars in said certificates, over and above the lawful interest, at the rate of 6 per cent. per annum, by the corrupt agreement of said parties, and for no other cause or consideration; all in manner and form as the defendant in his plea and rejoinder has alleged, and therefore find for the defendant his cost — which verdict found the defendant's plea in bar in the very terms of it, to be true.

Upon which, Hamlin moved in arrest of judgment, 1st. That the issue is immaterial; 2d. That said note is for final settlement securities, in a depreciating condition, and subject to a total loss in the course of six months, or to more than the value of £300 lawful money.

Judgment — That the motion in arrest is sufficient, and a repleader ordered. Upon a repleader the pleadings were in substance the same as before; to which a demurrer was given by the plaintiff, and the same exceeptions taken as in the motion in arrest. Judgment — That the plea in bar is insufficient. The judgment of the Superior Court was reversed, for the following reasons, viz. The point of a loan, and a corrupt agreement between the parties and William Campbell, was upon the first trial, put directly in issue to the jury, by the most correct and approved forms of pleading; and by them found for the plaintiff in error, in the very terms of the issue joined; the arrest of judgment goes upon the ground, that no corrupt agreement could exist in a case of this nature, when the thing loaned, was in a depreciating condition and of a perishable nature, and where the depreciation was at the risk of the lender.

1st. The jury were the proper judges not only of the fact, but of the law, that was necessarily involved in the issue; not only that there was in fact reserved by the agreement for loan and forbearance, more than at the rate of 6 per cent.

per annum; but also of the legal deduction, that it was reserved by corrupt agreement; if the circumstances of the thing loaned were such, that no corrupt agreement could arise out of the transaction, the jury should have found for the defendant in error, whatever sums were secured by the notes; but as they have found a corrupt agreement, it is too late for the court to say there was no such corrupt agreement; the point being determined by the proper judges.

2d. That the thing loaned, was in a depreciating condition and of a perishable nature, does not appear from the pleadings; and the court would not determine the fact by an inquiry *in pais*, nor by any matters *dehors* the record, upon the motion in arrest; this fact therefore, which was the sole ground of arresting the judgment, the court assumed without proof.

3d. Had there been evidence of the fact, it would not have justified the court, in arresting the judgment, or for giving judgment for the defendant in error on the demurrer; for there is no article whatever that can be loaned, but what may and frequently does, change its relative value, not excepting gold and silver coins; and if it be lawful for the lender to reserve more than at the rate of 6 per cent. per annum, to secure him from a possible loss, arising from a depreciation in one thing, he may in all; but this would destroy the statute against taking unlawful interest and render it of no effect.

4th. Whether at the time of the contract, in the present case, the article loaned would depreciate or appreciate, was perfectly uncertain, and a contract which in its creation, was usurious, could never be saved by a subsequent contingent loss in the value of the principal loaned.

5th. This contract was not a bargain of hazard as in the case of money lent on bottomry bonds, where the lender, by the act of lending, is exposed to the loss of his whole principal; but in this case the securities loaned were equally liable to loss by depreciation in whosoever hands they were, and the lending did in no measure increase the risk.

# REPORTS OF CASES

## ADJUDGED A. D. 1789.

Hon. RICHARD LAW, Esq., *Chief Judge.*

*Judges.*

Hon. ELIPHALET DYER, Esq., Hon. JESSE ROOT, Esq.,
Hon. ANDREW ADAMS, Esq., Hon. CHARLES CHAUNCY, Esq.

### MIDDLESEX COUNTY, JULY TERM, A. D. 1789.

DENNIE, ADMINISTRATOR OF DENNIE, v. CHAPMAN AND BEEBE.

**The statute respecting absentees is not a penal but a remedial statute. Where the assignee of a note was with the enemy, if the promissee remained at home, in the United States, and was not a bankrupt; the case is not within the statute.**

ERROR; complaining of a judgment of the County Court on a note given by the defendants to said John, deceased, dated 2d of July, A. D. 1766 for £200 lawful money with interest. This note was indorsed to Harrison Grey and the defendants notified of it, and this suit is for his benefit. In November A. D. 1768 they paid Grey two years' interest and £50 principal; in December A. D. 1769, they paid £40 to Grey — all which payments were indorsed on the note. From the commencement of the war Grey was inimical to the country, and went off to the British before the declaration of

independence, and never was a subject or citizen of the United States; and at the time of making the treaty, was a British subject. That said John Dennie was friendly and ever remained in the country until his death, and that the plaintiff also was friendly and always dwelt in the country at Boston.

It is further stated in the pleadings — That the defendants collected the money in continental bills, to pay said debt; but by reason of said Grey's being gone with the note, they could find no person to pay it to; and that it depreciated in their hands: And pray to have said note chancered both as to the principal and interest, agreeable to the statute provided in such cases. The court is of opinion that the case is within the statute, and that said note be chancered to £3 15s. 3d. lawful money; and gave judgment for that sum and the cost.

Errors assigned are — 1st. That this case is not within the statute. 2d. That if it was the defalcation is too great. The judgment was reversed; and upon both points the opinion of the court was against the judgment of the County Court.

The statute provides, that in every suit or prosecution in favor of persons who have gone to, and remained with the enemy, against any person, etc. who has remained in the United States; the court before whom such suit, etc. is depending, is authorized on motion of the defendant, to try and determine said cause, etc. according to the rules of equity; and the defendant is allowed to plead any special matter relative to principal and interest: And if it shall appear to the court, that in equity and good conscience abatement ought to be made, either from the principal or interest or both; the court is authorized to order and decree what they shall find to be equitable, both as to debt and cost.

This is not a penal, but a remedial statute, made for the relief of debtors, in suits, brought against them, by their creditors, who by going and residing with the enemy during the war, have put it out of their power to pay them their debts, in the currency of the country; which they were obliged

by law to receive; whereby they are exposed to suffer loss inevitably, unless relieved; and altogether by the creditor's placing himself in a situation inaccessible by the debtor.

By the laws of this state notes are not negotiable; and although, by the assignment, the assignee has the property of the note, and a right to collect and convert the money to his own use; yet the suit must be in the name of the original promisee or his administrator, etc. who has power, unless bankrupt, to control the action, to receive the money and discharge the note, and to whom in this case the defendants might have paid or tendered the money, which would have been good; as both the plaintiff and said John were of sufficient ability to pay the money over to said Grey.

## Ely v. Stow.

**A writ of error, that misdescribes the court which rendered the judgment complained of, is amendable on payment of cost, on motion of the plaintiff before any plea put in.**

**A note obtained by extortion, fraud or duress, is not within the Statute of Usury to be relieved against by filing a bill in equity.**

Writ of Error against the judgment of the County Court, in an action Ely v. Stow brought on a note dated 14th June, A. D. 1786, for £72 lawful money, payable with interest; against which note the defendant filed a bill in chancery upon the statute; complaining that said note was usurious and oppressive; for that in A. D. 1782, Daniel Stow, Jr. son of the defendant, was on board of a vessel with one Colton, who had a quantity of tobacco on board, designed for Plumb Island; that said Colton proposed to leave said vessel, and to sell his tobacco to said Daniel Jr. for the sum of £57 lawful money; to which said Daniel agreed and gave his note, without interest, and which was to be paid out of the avails of the tobacco; that said Colton altered his mind, and remained on board, sold his tobacco himself, and took the avails of it; but did not deliver up said note; that in A. D. 1786, said Daniel, Jr. went to Springfield upon the desire of said Colton, to

settle the affairs of said voyage; and said Colton and the plaintiff having got him there, they caused him to be arrested and imprisoned on said note; upon which the defendant, father of the said Daniel, being applied to by the plaintiff, and said Colton, and informed of his son's situation, and being ignorant of the injustice of said first note, was induced, in order to relieve his son from imprisonment, to give the note on which, etc. and for no other cause or consideration; in which is included said first note, interest and cost; and is usurious and oppressive.

To this complaint a demurrer was given — and the County Court gave judgment, that said complaint was sufficient, and that the plaintiff recover nothing on said note.

Error assigned — That said court ought to have judged said complaint insufficient, and for the plaintiff to recover. The plaintiff in error, having in his writ described the time of the County Court's sitting to have been on the second Tuesday of April, whereas it sat on the first, moved to amend his writ, by striking out second and inserting first to make it conformable to the record, which upon dispute was allowed to be done, on payment of cost, as being within the Statute of Amendments.

The defendant plead, that there was nothing erroneous, etc. and the judgment of the County Court was reversed.

The paragraph of the statute, which is entitled, an act for restraining the taking of excessive usury, makes it lawful for the defendant in any action, on bond, bill, mortgage, etc. on the second day of the court's sitting to inform the court, by filing his complaint that said mortgage, bond, etc. is usurious and oppressive, and was given for no just or reasonable consideration: And the court shall proceed as a Court of Chancery, to search out the truth, etc. and if the court shall find said bond, note, etc. to be usurious or oppressive, etc. they shall give judgment only for the just value of the goods sold; or the principal sum received without interest.

The statute contemplates an usurious oppression. Every oppression is not usurious; and every note or bond given without consideration, is not an usurious obligation. In this case

the sale was complete — the property of the tobacco was transferred to said Daniel Jr. and Colton is accountable to him for the avails of it. And if the defendant was induced to give the note on which, by an unlawful imprisonment of his son, it might be duress but not usury. The back interest upon the first note, which was not on interest being included in the second did not make the second usurious; for it was lawful for them thus to agree and do.

PARSONS, SHERIFF, v. WHETMORE.

**Money for the support of prisoners who have taken the insolvent debtor's oath, is to be lodged with the gaoler.**

ACTION on bond; conditioned that Jeremiah Whetmore who was in prison for debt on an execution should abide a true and faithful prisoner; alleging that on the 16th of May he made his escape, etc.

Plea in bar — That on the 18th of April said Jeremiah took the oath provided for poor debtors; and on the 20th his weekly allowance was set by the court at five shillings and six pence per week, and that the creditor in said execution, did not pay to him said weekly allowance after the 27th of said April, nor any part thereof, except five shillings and six pence on the 9th of said May, and thereupon said Jeremiah on said 16th of May, was not liable to be holden in prison.

Plaintiff replied — That on the 22d of said April he furnished the gaoler with £3 lawful money, to defray said Jeremiah's weekly allowance, as the same should become due: And that said Jeremiah had received before said 16th of May his weekly allowance, as the same became due to said 16th, inclusively. Special demurrer.

Judgment — That the plaintiff's reply is sufficient.

The principal question made in this case, was — To whom the allowance ought to be paid by the creditor — to the gaoler or the prisoner.

The statute is, that the keeper of the prison, shall not stand charged with the supply of victuals or other necessaries, of

any person committed to prison in any civil matter or action; and in case he hath no estate, and will and do take the oath provided by law; the keeper of the prison shall not stand charged with such prisoner, unless the creditor shall allow him a weekly maintenance, such as shall be allowed by the County Court. The gaoler is the person with whom the weekly allowance is to be lodged; and thereupon he becomes chargeable to the creditor, for the safe-keeping of such prisoner, and accountable to the prisoner for his support; and that at the time of the prisoner's escaping there was a sufficiency of money lodged for his support with the gaoler.

BROWN v. FREEMAN.

**The fee of the land left for highways is in the proprietors. See Buel v. Clarke et al., *ante*.**

ACTION of ejectment. Plea not guilty to the jury. The plaintiffs claim under a grant and survey from the town of Chatham. Chatham was formerly a part of Middletown, and the land belonged to the proprietors of the ancient town of Middletown, including Chatham; and in the act incorporating said town of Chatham, all common lands were left to belong to the proprietors of said ancient town. The defendant claims under a grant from the proprietors of said ancient town of Middletown.

In A. D. 1715, the proprietors voted to lay out the new three mile grant, next to Colchester, in mile tiers, and to lay three highways, one at the end of each tier. In A. D. 1721, they laid a highway at the east end of said grant, two rods wide; then laid out a mile tier of lots and a thirty rod highway; then another mile tier and a thirty rod highway; then a third tier and left a highway thirty-two rods wide, between the new grant and the old lots, which was much wider at one end than the other, by reason of the new grants but running parallel with the line of the old lots. The grant was made

to one White, to satisfy a deficiency in one of the divisions in said town; and was land not needed for a highway.

The question of law upon the facts, was — Whether the fee of lands left, or ordered by the proprietors to be left for highways, passed from them, or only the use, in case they should be wanted for that purpose? And whether they are resumable by the proprietors, in case they are not wanted for highways?

By the COURT. The fee did not pass out of the proprietors, and the lands are resumable by them if they are not wanted for highways. And verdict and judgment accordingly was for defendant.

SIGONY V. RICHARDS AND BUEL, TRADERS IN COMPANY.

**In an action against two, upon a note which on the face of it, is joint and several, and so declared upon, it is not a material variance, that upon oyer it appears to be signed by one only for self and partner.**

ACTION on a note, declaring that the defendants in and by a certain note, etc. jointly and severally promised to pay to him, etc. Richards prays oyer of the note and pleads in abatement; that there is a material variance between the note declared upon and the note shown on oyer; for that the note shown on oyer appears to have been executed by Buel only, for himself and Richards; and that he could not bind Richards severally although the note is so expressed. Demurrer.

Judgment — Plea insufficient.

The note is expressly joint and several. The plaintiff has declared upon it truly, as it is expressed to be on the face of it; there is therefore no variance.

Whether Buel had authority to bind Richards his co-partner, severally or not, may depend upon circumstances, which might be disclosed in an action brought against him severally; but this is a joint action brought against both, in which that question doth not arise.

**NEW HAVEN COUNTY, AUGUST TERM, A. D. 1789.**

HALL v. HALL.

**It is the duty of an officer, to release the body of a debtor, taken upon execution, where sufficient property is tendered before commitment to prison.**

ACTION of trespass, assault, and false imprisonment. Plea not guilty. Issue to the jury.

The jury found a special verdict as follows, (viz.) That on the 12th of June, A. D. 1788, the defendant was constable of Wallingford, and as such had in his hands a lawful writ of execution in favor of James Gordon of Plainfield, against the plaintiff, for the sum of £13 12s. 2d. lawful money, dated 23d of April, A. D. 1788, returnable in sixty days: That on said 12th of June, the defendant applied to the plaintiff, and made demand of money and estate to satisfy said execution, and none being shown to him, he levied upon the body of the plaintiff; and on the 13th of same June committed him to gaol: The jury further found that immediately after said execution was levied as aforesaid, the plaintiff then and there in said Wallingford, offered and tendered to the defendant, sufficient personal estate to satisfy said execution, and his fees, of his own property; and the defendant refused to receive or to take said estate and release the body of the plaintiff.

The jury then raised the question of law about which they doubted, viz.— If the law be so upon the facts aforesaid, that the defendant ought to have taken the estate tendered to him as aforesaid, and released his body, then they find the defendant guilty, and £15 damages for the plaintiff: But if the law be otherwise, then they find that the defendant is not guilty.

The court are of opinion — That the law is so upon the facts aforesaid that the defendant ought to have received said estate tendered, and released the body of the plaintiff; and gave judgment for the plaintiff to recover £15 damages and cost.

And by the COURT—

By the statute, entitled, an act concerning arrests and imprisonment, it is enacted, "That no man's person shall be arrested and imprisoned for any debt, damage, or fine, where sufficient means of satisfaction can otherwise lawfully be found from his estate, to be shown and presented by him; but if no such satisfaction can be found, his person may be arrested and imprisoned."

By this law, no man's person shall be arrested or imprisoned, for any debt, etc. if sufficient means of satisfaction can otherwise be lawfully found from his estate, either by the debtor's showing it, or by the officer, without the debtor's showing it: This construction is evident from what follows; but, if no such satisfaction can be found, his person may be arrested and imprisoned. And this statute which was made in favor of personal liberty, is to be construed liberally.

By the statute, directing and regulating the levying and serving executions, it is enacted, "That the sheriff or officer, to whom an execution is directed, shall repair to the place of the debtor's usual abode, if within his precincts, and there make demand of the debt, or sum due on such execution, with necessary charges, etc. And upon refusal or neglect of payment of the same, the officer shall levy the execution upon any of the personal or movable estate of the debtor; except necessary apparel, bedding, etc. etc. and upon such goods also, if they shall be presented by the debtor."

Here it is plain that on failure of payment, the officer is required to levy upon any of the personal estate of the debtor, whether shown or not by the debtor, except certain necessary articles for upholding life; upon which he may not levy, unless they shall be presented by the debtor.

If the officer doth not know the estate of the debtor, and hath no means of finding it, and the debtor will not show it, nor the creditor point it out; he must in that case take the body if to be found, if not, may return the execution, *non est.*

In the fourth paragraph of the same statute, it is further enacted, "That, in case movable or personal estate of the

debtor, sufficient to satisfy the debt, and charges, cannot be found, and the creditor shall not agree to accept the debtor's lands, the officer shall levy the execution on the debtor's body, and him commit to the common gaol," etc.

This clears every doubt and difficulty that might possibly arise, in the construction of the other parts of the law. Further, the form of the execution is in the words of this statute. The officer is commanded of the money, goods, and chattels of the debtor, to cause to be levied, and the same being disposed of as the law directs, paid and satisfied unto the creditor the sums aforesaid, etc. and for want of money, goods or chattels of the debtor, to be by him shown unto you, or, found within your precincts, for satisfying the aforesaid sums, you are hereby commanded to take the body of the debtor and him commit unto the keeper of the gaol, etc.

Thus neither the law, nor the execution, will warrant or justify an officer in taking the body of a debtor where the means of satisfaction can be otherwise lawfully found from his estate — whether he present and tender it or not — but clear it is, where sufficient estate is tendered by the debtor, his body cannot be taken.

The facts in this case as found by the verdict are — That on the 12th of June, the defendant applied to the plaintiff, and made demand of money and estate to satisfy said execution, etc. and none being shown to him, he levied upon the body of the plaintiff; and on the 13th of the same June committed him to gaol; that immediately after said execution was levied as aforesaid, the plaintiff then and there in said Wallingford, offered and tendered to the defendant sufficient personal estate to satisfy said execution, and his fees; his own property; and the defendant refused to receive or take said estate and release the body of the plaintiff, etc.

Now the question of law made, is — Whether, the officer having levied the execution upon the body of the debtor, for want of estate shown by him, must, at all events commit him

to gaol: It is clearly the opinion of this court, that in certain cases, he must not, and that it would be false imprisonment in him to do it.

As first — where after the levy upon the body the debtor tenders all the money; whether he was possessed of it at the time of the demand and levy, or acquired it after, is immaterial. Secondly, where the debtor offers and tenders sufficient personal estate of his own property, to satisfy the execution and charges; for there can be no difference, in the view of reason or of law, between a man's tendering money or sufficient personal estate, to an officer upon an execution; where the officer has a certain method pointed out in the law, to turn it into money. In both cases the liberty of the citizen is saved; which is a primary object in the consideration of the law; the officer is completely indemnified; and the creditor hath all that security and means of satisfaction, which the law gives in any case. That the property was the debtor's, and sufficient to satisfy the execution, are facts found by the verdict, and cannot be questioned. There is not a single reason in favor of excusing the body, and taking estate, before a levy, that don't operate with equal force, for releasing the body, for estate after a levy upon it; nor is there a single objection, but what lies equally against the one as the other; for if the officer might have taken the body, but doth not, and takes estate he will be liable to the creditor, as much in one case as the other, for the estate may prove deficient, or the title not be the debtor's: or in case the money is paid, it may be counterfeit; the law knew that these things might happen, but did not suppose them good reasons for imprisoning the body at all events; and is peremptory that it shall not be imprisoned, if sufficient means of satisfaction may otherwise be had from the estate, viz. judging and acting reasonably. The officer may be rash and hasty in levying on the body, and the debtor may instantly tender property to ten times the amount of the debt, about the title of which there can be no question; or the debtor

may be poor and not have estate to tender, when levied upon, but some friend may sell him property, about which there can be no doubt, as to the title or sufficiency; and he tenders it — Is the debtor in such cases to be dragged to prison? And is there no redemption for a debtor's body, when once levied upon?

The court are of opinion — That personal property, tendered, which the officer has a sure way to turn into money, is equally available to release the body, as paying the money; for if estate is taken, and it proves to be insufficient to pay the debt, the officer may levy for the residue, on further estate; and in want of it, may take the body: the case is precisely the same, where the body is taken, and released for estate; for the release of the body in the latter case, will not be considered an escape but a release by order of law.

HALL v. HALL.

THIS judgment was reversed by the Supreme Court of Errors in May, A. D. 1790, for the following reasons, viz. after stating the facts found by the special verdict.

The only question in law made by the council on the special verdict, is — Was the officer holden and obliged to release the body of the debtor, on his tendering and offering estate sufficient to satisfy the execution.

By the COURT unanimously. The officer's duty is clearly pointed out in his precept or execution, agreeable to law, and he is to execute the same humanely and give it a reasonable construction. He is to search for property whereon to levy, at the proper place, viz. the debtor's place of abode; and also to make demand, and if none is found by search, or shown to him by the debtor upon demand, he is to levy on the body of the debtor, and him hold until the money is paid, or the debtor released by order of law. Before the levy on the body, the debtor is to have his election, either to pay the money, tender estate sufficient, or deliver his person to the officer; if he neglects or refuses, and the officer makes the levy on the body, he

is answerable for the body of his prisoner; and not obliged to release it, unless the debtor pays the money. Otherwise it would be in the power of the debtor to play with the officer, by tendering him property, the title to which was doubtful, the value uncertain, and thereby distress and perplex the officer and lead him into suits at law, while the officer was liable to the creditor, and could not relevy on the body. It may be prudent and safe for an officer to release the body and accept chattels, and he has his election; but it is at the risk of the officer to accept of anything but the money in lieu of the body.

It is the opinion of the court upon the facts found, that the law is with the plaintiff in error.

NETLETON v. RIGGS.

**Action of trover lies against a promisor for his note which he got up through the fraud of a third person.**

ACTION of trover, for two notes of £9 10s. each given by Riggs to Netleton. Plea not guilty to the jury.

Case was — Netleton had an execution against Hind and Mather of about £19. Riggs in aid of them, gave said two notes to Netleton, in settlement of said execution. Netleton owed Woodhull by note about the sum of said two notes, and delivered said two notes to him to receive his pay of Riggs. Hind goes and pays Woodhull the debt which Netleton owed him, and took an assignment of Netleton's note to himself. Mather, who was bankrupt, by means of a forged order, got up from Woodhull, Riggs' two notes to Netleton, and delivers them up to Riggs and Riggs gave up his indemnity. Hind sues and recovers the money of Netleton on his note to Woodhull.— And this action is brought to recover for said two notes which the defendant got up by Mather's fraud without paying them.

Verdict and judgment for the plaintiff; upon the ground that Riggs may not take benefit of Mather's forgery and fraud.

STAPHORSE v. COUNTY OF NEW HAVEN.

ACTION for the escape of one Warren, committed on execution, through the insufficiency of the gaol.

Judgment last court — That the county was liable. The debt is about £500.

Question upon a hearing in damages — Whether judgment should be for the whole debt and the lawful fees; or only for the special damages the plaintiff had sustained by the escape.

Judgment for £75 the special damages only. Contra LAW, J.; CHAUNCEY, J., excused himself from judging.

This appears most agreeable to the genius of our laws and the policy of the country. If the debtor has estate, the creditor has his remedy against him; if he is bankrupt, it is of little consequence to keep him in prison; and the special damages may be such as to induce the counties to keep their gaols in good repair, and enable the creditor to recover his debtor again.

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**FAIRFIELD COUNTY, AUGUST TERM, A. D. 1789.**

DESBOROUGH v. DESBOROUGH.

**An arbitration note for £10 vouched by two witnesses, is not within the jurisdiction of a justice of the peace.**

WRIT OF ERROR, to reverse a judgment of a justice of the peace, upon a note of £10, given to oblige the party to abide the award of arbitrators, and witnessed by two witnesses.

Plea to the jurisdiction of the justice — That this is not a note for money only, but is to bind the party to perform the award of arbitrators. Judgment — Plea insufficient.

Error — That said justice ought to have judged said plea sufficient. Plea — Nothing erroneous.

Judgment — Manifest error.

By the COURT. The jurisdiction of a single minister of justice is limited to the sum of £4 in all cases, except in suits

on bonds or notes for money or bills of credit only vouched by two witnesses, it is extended to the sum of £10. This note is an escrow, deposited in the hands of the arbitrators, to oblige the defendant to do one of two things, viz. to perform the award, or pay the £10. And by the established rules of proceeding, the sum of the award and interest, is the rule of damages. In such cases the justice therefore has not jurisdiction of the cause.

STEAVENS v. BASS.

**An action upon an arbitration note for more than £20, is not appealable, if neither the original matters submitted or the award amounts to £20.**

ACTION on a note for £20 on interest, dated 15th January A. D. 1788, given to oblige the defendant to abide an award. Writ is dated the 2d of April A. D. 1788, and demands £30 damages.

Plea in abatement of the appeal — That the original matters of controversy submitted, did not exceed £20: That the sum awarded is but £13 5s. 5d. Which facts were admitted; and said plea in abatement was judged sufficient.

The statute is — That in any action brought to be heard and tried by any County Court, wherein the value of the debt, damage, or matter in dispute, shall exceed the value of £20, an appeal shall be allowed to the next Superior Court. Here the award is the only matter in dispute, although the action is upon the note, according to the principles laid down in the last case; and the original matters submitted, and the sum awarded, do not amount to £20.

ABEL, SHERIFF, v. BENNET.

**An escape by a prisoner, who has the liberties of the yard, is a negligent escape, and where the creditor's remedy against the sheriff is barred, nominal damages only are given.**

ACTION on a note, conditioned, that Sarah Ferress should abide a faithful prisoner, who was in gaol on an execution. Breach alleged, is — That she escaped on the 22d of April A. D. 1785.

Plea in bar — That said Sarah did inadvertently go about thirty feet over the limits of said prison; yet he says, that she immediately returned into the confines of said prison and requested the plaintiff to receive and hold her in gaol, on said execution; but he wholly refused to receive or hold her: And that more than two years had elapsed since said escape; and by the Statute of Limitations in such cases, the creditor is barred of any recovery against the plaintiff. Demurrer.

Judgment — That the plea is insufficient, and for the plaintiff to recover: and nominal damages only were given, on the ground that the plaintiff was not liable to the creditor.

The escape was a negligent escape in the sheriff, and it was a breach of the condition of said note. The sheriff undoubtedly had his election, either to make fresh pursuit and reclaim his prisoner, or to take his remedy upon the bond; but neither the prisoner nor the bondsman, in such case, could oblige the sheriff to receive her, after the escape.

In the case of Jones v. Sheriff Abbey, Windham Superior Court, March term, 1789, adjudged — That the escape of a prisoner who hath the liberties of the yard on bond, is a negligent escape, only in the sheriff.

### Embra v. Silliman and White.

**Service of an attachment by reading or leaving a copy, good to hold to trial.**

Action against both by writ of attachment and served on White by a copy. Plea in abatement — That neither his person or estate had been attached.

Judgment — Plea insufficient. The defendant cannot complain that he has not been attached. Legal notice is all that is necessary for the purpose of trial, and this was given him. See Seers v. Blakesly, *ante*.

SMITH v. PURDY.

**Interest not recoverable in an action of book-debt, by an agreement made more than three years before action was brought.**

ACTION of debt on book for supporting a pauper, etc. upon a special undertaking by the defendant, as one of the overseers of the poor, for the space of five years and eight months, and the interest. Issue to the court.

Judgment — That the defendant does owe the plaintiff, etc. and that he recovered the principal of the debt. But the interest resting upon a parol agreement of more than three years' standing is barred by the Statute against Frauds and Perjuries.

NICHOLS v. PIXLY.

**A license from the town to erect a mill dam, no justification in an action for a private nuisance.**

ACTION of the case for a nuisance in Poquannock river, etc. by erecting a grist mill and dam, etc. Not guilty to the jury.

The defendant relied much upon a license, which he had obtained from the town of Stratford, in whose bounds said stream and dam is, to erect said mill and dam.

By the COURT. The license, however it may estop the town from proceeding against the dam as a common nuisance, it can be no excuse or justification for an injury done to private property. And verdict and judgment was for the plaintiff.

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**LITCHFIELD COUNTY, AUGUST TERM, 1789.**

FLIMING, EXECUTOR OF M'DONALD, v. BATES.

**It is inadmissible for a defendant to file a bill of usury against an obligation, after a trial by jury and a new trial granted.**

**The defendant is not admissible as a witness to substantiate his bill, filed upon the statute.**

WRIT OF ERROR, complaining that he commenced an action against said Bates to the County Court, on a note given to said M'Donald: That said Bates plead in bar of said action, that there was included in and secured by said note more than law-

ful interest, by the corrupt agreement of the parties; and that said note by force of the statute, was void — on which facts the parties were at issue to the jury; who found that there was not included in and secured by said note more than the lawful interest, etc. and found for the plaintiff to recover the sum of §247 16s. lawful money damages and his cost. That said Bates afterwards preferred his petition for a new trial in said cause, on the ground of having missed his plea; for that he ought to have filed his bill of usury on the second day of the court, instead of pleading in bar of the action, and prayed for a new trial in order that he might file his complaint, etc. That said County Court granted him a new trial; and said cause was entered and continued to the court holden on the fourth Tuesday of March, A. D. 1788; and on the second day of said court, said Bates filed his complaint against said note, which said court admitted, and proceeded to search out the truth of the complaint, by the oath of the defendant, said M'Donald being dead; and thereupon said court considered and gave judgment that said note was usurious and oppressive, and for the plaintiff to recover only the principal due on said note, exclusive of the interest.

Errors assigned were — 1st. That no new trial was grantable in such a case, and for such a cause. 2d. That said court ought not to have permitted the defendant to have filed his complaint as aforesaid; nor admitted him to his oath to prove it, contrary to the verdict of the jury, the said original promisee being dead. Plea — Nothing erroneous.

Judgment — Manifest error.

By the Court. The statute made to prevent the taking of unlawful interest, provides two remedies for the mischief; and the defendant has his election, either to charge the usury directly and avoid the security wholly, or to file his complaint on the second day of the court's sitting and thereby lay a foundation for the court to proceed to search out the truth, by

the oath of the parties, or in any other way proper for a Court of Chancery: And if the plaintiff shall refuse to be examined upon oath, he shall be nonsuited; and if upon such inquiry said obligation is found to be usurious, the whole of the interest shall be expunged and judgment be given for the principal sum due on the note only. But the defendant cannot avail himself of both remedies.

The complaint must be filed on the second day of the court, to which the suit is brought and not after. The granting of the new trial for the purpose of filing his complaint was perfectly idle; and allowing him to file it at the time and in the manner it was done, is directly against the statute; and then admitting the defendant a witness to substantiate his own defense is contrary to the rules of proceeding in chancery — would endanger all written securities — and tend to defeat the guards provided by law against frauds and perjuries.

This judgment was affirmed in the Supreme Court of Errors.

SALISBURY v. FAIRFIELD.

**A ward has right to reside with his guardian and such residence gains no settlement.**

ACTION to recover pay for supporting one Samuel Allen a pauper. Issue to the jury.

The pauper was born in A. D. 1757; his parents were then settled in Fairfield; afterwards his father died. His grandfather, who also was settled in Fairfield, took guardianship of him in A. D. 1764. His mother married another husband, whose name was Allen, and was also settled in Fairfield. In A. D. 1766 his mother and her husband removed to Stamford; and in A. D. 1768 his grandfather and guardian removed with him to Stamford, he then being eleven years old; and he lived with his guardian in Stamford until he was fourteen years of age, when he chose a guardian, and was bound an apprentice to a master settled in Stamford.

The question was — Whether the pauper had gained a settlement in Stamford. Verdict for the plaintiffs.

And by the COURT. The pauper's residing in Stamford as an apprentice gained no settlement; and his residing there with his guardian three years, gained no settlement, neither in right of his guardian, nor in his own right by commorancy; he was not a subject of being warned, nor might he be parted from his guardian during his minority; his residence therefore in Stamford was of necessity, and not by the approbation of the town of Stamford.

This judgment was affirmed in the Supreme Court of Errors.

HURD v. FLEMING, EXECUTOR OF M'DONALD.

**Action of book-debt lies for money paid on a note that hath not been applied, and the interest.**

ACTION of debt on book. Plea — Owe nothing. Issue to the jury. Book was for £45 paid to the deceased on a note.

The defendant objected to the plaintiff's being admitted a witness to prove the article charged: But by the court he was admitted, on the ground of precedents; the case of Prentice v. Phillips, adjudged at Hartford, was cited; and a bill of exceptions was filed.

The plaintiff testified — That he paid the money to said deceased and took of him a receipt, which he had lost: That the whole sum of the note on which he paid it, had been recovered of him with the interest.

Verdict for plaintiff to recover the principal sum with interest.

Writ of error was afterwards brought to the Supreme Court of Errors on the bill of exceptions and judgment was affirmed.

This was extending the remedy by action on book, very far indeed. It is enabling the plaintiff, under the form of this action, to introduce himself a witness to prove payment, made upon a note or bond; which will render the security of debts by specialty less safe.

The case of Prentice v. Phillips was relied on, tried at Hartford adjourned Superior Court, November A. D. 1785, which was an action on book for £200 hard money, paid on the 1st

of May A. D. 1776 to the daughter of said Phillips, on account of a note he held against Prentice, and which had not been applied. Plea was, owe nothing. Issue to the jury. It was objected, that this was not a proper article to be charged on book; and as there was no other article charged, the book ought not to go to the jury; and that the plaintiff ought not to be admitted to testify to it. Both objections were overruled. The book and the plaintiff were admitted, and the plaintiff recovered principal and interest.

**HARTFORD COUNTY, SEPTEMBER TERM, A. D. 1789.**

HUDSON AND GOODWIN v. PATTEN.

**The printing copies of a book for another and on his copyright, is the same, as though the other had printed them for himself.**

ACTION upon the statute, entitled an act for the encouragement of literature and genius; for bringing into this state and selling 1,500 copies of Webster's Institute of English Grammar, of which they claimed the copyright; contrary to the statute, and in violation of their right, and demanding the penalty. Plea not guilty. Issue to the jury.

The case was—The plaintiffs had purchased of Mr. Webster the copyright of his Institute of English Grammar, to print and vend in this, and in all the New England states, and in the state of Vermont; to pay £5 for every thousand they should sell. One Campbell purchased of said Webster the copyright to print and sell as many as he could in a certain given time, in the state of New York, for £60. Campbell employs the plaintiffs to strike off 2,000 copies for him in sheets, he to pay for the printing and paper; which they did, and sent them to him in New York; the defendant goes to New York, purchases 1,500 of them in sheets, of Campbell, brings them to Hartford, binds and sells them.

Question was — Whether this was a proceeding contrary to the statute: Verdict for plaintiffs and £100 damages, and accepted by the court; for although the plaintiffs printed them at Hartford, yet they were for Campbell, and upon his copyright, and to be sold in the state of New York; it was therefore,

the same as though Campbell had printed them, in New York, on his own right, and the defendant had introduced them here.

STATE V. SHAW AND SIX OTHERS.

An officer, in a prosecution for a crime, after making known his business, and demanding admittance may break open the door, in order to make an arrest.

Persons joined in a complaint against whom there is no evidence; may be admitted as witnesses.

INFORMATION for a riot. Not guilty plead. Issue to the court. Shaw was an officer, had a warrant against one Allen for lewd behavior; Allen had given out high threatenings against Shaw: Shaw took these people with him to assist him in taking of Allen; as he had constantly avoided him. After making known his business, and demanding admittance into the house, being refused, he broke the door, and entered the house with two of his assistants; the others did nothing, but remained out doors.

A motion was made, after the evidence for the state was through, to introduce said attendants as witnesses, against whom there was no evidence, but their going with Shaw by his command to the house. The court took time to consider of it, and was of opinion that their going with Shaw by his command, and being present when he broke said doors, under the circumstances was doing nothing that was unlawful; and they were admitted, and the defendants found not guilty, and dismissed without cost.

DANA V. ROBERTS.

A juryman may not converse with any person not of the jury, upon the merits of a cause under consideration. A juryman whose conduct is impeached by a motion in arrest may not be a witness.

VERDICT for the plaintiff. Motion in arrest of judgment, that one of said jurors while they had the cause under consideration, related to a Mr. Merrils, the full state of the case, and of the evidence on both sides; the facts being proved, the court set aside the verdict.

By the COURT. The principal guard upon jurors in this state, is, their oath and their virtue — if they are suffered to enter into conversation with people respecting the causes they have under consideration, the purity of trials by jury, the great barrier of liberty and justice will be corrupted; it ought therefore to be guarded with the most vigilant attention. The juror, was not admitted to testify upon the motion, either to criminate or exculpate himself. 1 Durn. 11; 1 Str. 642.

BEACHER v. HART.

**A constable may not be chosen out of the month of December, only in case of death or removal.**

ERROR. Beacher sued Hart on a note; Seth Lewis served the writ as constable.

The defendant plead in abatement — That said Lewis was not constable, and had no right to serve said writ; plaintiff replied that he was not chosen at the annual meeting in December, but that said annual meeting was adjourned into the month of January, and that he was then chosen constable and sworn; to this reply the defendant gave no answer although moved for, and the County Court gave judgment, that said Lewis was not chosen constable in the month of December, but in the month of January, and said choice was illegal and void, and that said writ abate.

Errors assigned were — 1st. That the court ought to have ordered the defendant to have answered said reply. 2d. That said writ ought not to have been abated.

Judgment — Nothing erroneous.

By the COURT. Regularly in every action at law, an issue in fact or in law, ought to be joined, in order to a decision; but the practice has been otherwise in pleas of abatement, and a plea unanswered has been considered as demurred to; and it is evident the County Court considered these pleadings in that light, for the court found the facts in the reply to be insufficient.

The statute is express, that constables, and other town

officers, shall be chosen in the month of December, and be sworn; and certain duties are enjoined upon them to perform in the month of January; and the act relating to constables is express that constables shall be chosen and sworn before the 1st day of January; and in case any town by death or removal of the constable or constables thereof, shall become wholly destitute of such officer, such town shall assemble forthwith and proceed to the choice of a constable or constables, to supply the vacancy so made, who shall be sworn, etc. Had the towns a right to choose their constables in any other month than December, the provision of this act would have been unnecessary.

BRICK ET AL., EXECUTORS OF BRICK, v. REED.

**In trover, if the effect of the suit is to recover the thing demanded, the plaintiff shall have full cost, although the jury found the special damages under forty shillings.**

ACTION of trover for an execution of £41. Plea not guilty to the jury.

The debtors in said execution were poor; the defendant was an officer and received said execution with discretionary orders; he collected £24 and indorsed it on the execution, and had paid to the plaintiffs £12; the execution was demanded of the defendant and refused, and after the action was commenced the execution was returned and received by the plaintiffs.

The jury found the defendant guilty, and twelve shillings damages which was accepted by the court; DYER and ROOT, JJ., dissented, upon the principle that the jury ought to have given in damages the £12, which he had received and indorsed, and had not paid to the creditor; and saved another suit: For the refusal was a conversion of the money received, as well as of the execution on which it was received and indorsed.

An objection was made to allowing any more cost than damages; by the court full costs must be allowed for the effect

of the suit was a recovery of the execution, as well as the twelve shillings given by the jury for special damages.

### Watson v. Gaylord.

**A bill of usury filed against a mortgage deed on a petition for foreclosure, may be received as an answer or a cross-bill.**

Petition in chancery to foreclose the equity of redemption in certain mortgaged premises.

The respondent on the second day of the court filed his complaint; alleging that more than lawful interest was included in, and secured by said mortgage, and prayed the aid of the petitioner's oath; the petitioner objected to receiving it: The court on consideration determined that as the petition was in chancery, the defendant had right to answer or file his cross-bill, and to have the benefit of the petitioner's oath.

The petitioner objected against being examined on oath touching said usury, because if true it would expose him to a penalty: But by the court the objection was overruled, and the petitioner withdrew his petition.

### State v. Worthington.

**Upon a remonstrance to a return of auditors the court, will inquire of the auditors upon what principles they made out the balance.**

Return of auditors in an action of account. Remonstrance — That the auditors had made a mistake, by charging the state a large sum in good money nominally, which was paid by said Worthington in depreciated bills. Objection was made as to any inquiry, respecting those facts; the court determined and did inquire of the auditors the principles upon which they made out the balance.

And said return was accepted.

**WINDHAM COUNTY, SEPTEMBER TERM, A. D. 1789.**

DIXON v. PIERCE.

**Where a judgment is severable it may be reversed in part. The illegal part of a bill of cost reversed and the judgment affirmed as to the damages and legal costs.**

ERROR. Pierce brought an action to the County Court against Dixon, for riding over his daughter, a minor, whereby she was much hurt, and he put to cost in her cure. Verdict and judgment was, that the plaintiff in said action recover fourteen shillings damage, and cost: Cost taxed at £5 17s. 3d.

Error assigned — That no more cost than damages ought to have been allowed. Plea nothing erroneous.

Judgment — Manifest error; and judgment reversed as to the cost over the sum of the damages.

This is a case within the statute, where no more cost than damages is to be recovered; and as the severance may be made, the court reversed the judgment only as to that part which was illegal, viz. all the cost over the sum of the damages.

DEWIT v. BALDWIN.

**A garnishee may give in evidence upon the *scire facias*, what the absconding debtor had said, to disprove his owing him. The plaintiff may introduce other evidence, besides the garnishee, to prove his indebtedness.**

**An issue joined by the parties upon a *scire facias* against a garnishee, may be tried by the jury.**

SCIRE FACIAS against Baldwin as debtor to one Dimock, an absent absconding debtor. Issue was closed to the jury. Question was put to the court, whether such a cause might be tried by the jury. By the court it may.

The question was — Whether Baldwin owed Dimock; what Dimock had said previous to any controversy was admitted to be given in evidence by the defendant, to prove that he did not owe him; on the ground that the plaintiff stood in Dimock's right: and the plaintiff was allowed to produce other evidence besides the defendant's testimony, to prove the indebtedness of the defendant, taking a distinction between the case in chancery where the petitioner calls upon the respondent to disclose upon oath, and where the law lets a party

in to testify for the benefit of both; one is by the act of the plaintiff, the other by act of law.

STORES v. STORES.

**An order drawn by the plaintiff on a third person, for value received in favor of the defendant, and delivered to him, may be charged on book, and the plaintiff be allowed to swear to it.**

ACTION of debt by book. Plea — owe nothing. Issue to jury. The book consisted of two articles; one for cash paid £4, and one for an order drawn in favor of the defendant, on William Campbell, for £60 value received.

Question to the court — Whether such an order may be charged on book; and whether the plaintiff may be admitted to swear to it, when in the writing he has acknowledged that he has received the value.

By the COURT. The order may properly be charged on book, and the plaintiff be allowed to swear to it, it being an article of commerce; there is a wide difference between an action brought upon an order or bill of exchange, and an action brought for an order or bill of exchange.

ELDERKIN v. ELDERKIN.

**An action in the name of a bankrupt, whose property is all assigned to trustees, is not sustainable upon a note taken before the bankruptcy.**

ACTION on note, executed at Roxbury in the Massachusetts, payable to plaintiff or order, where notes are negotiable, and there indorsed to Thomas Lee; said note dated 20th October 1770.

Before the commencing of this suit the plaintiff obtained an act of bankruptcy in his favor, and all his property was assigned to trustees. Plea — Full payment. Issue to the court. Objection, that this action cannot be maintained in the plaintiff's name: By the court it cannot; and it was withdrawn.

But the court was of opinion — That an action might be maintained by Mr. Lee, the indorsee in his own name, as the

note was executed and indorsed in the state of Massachusetts, where by law it was negotiable.

**NEW LONDON COUNTY, SEPTEMBER TERM, 1789.**

MAPLES AND MONROE V. PECK.

**In an action by an officer, for goods taken in execution, upon a special undertaking of the defendant to keep and redeliver them; it is not necessary to aver that he posted them, nor that the judgment remains in force unsatisfied.**

ERROR. Peck was an officer, had an execution in favor of Marcia Maples against said Monroe and others to serve and collect — he levied it on some cattle, the property of Monroe, and was about to post them, and upon the request of the defendants he delivered said cattle to them to keep, and took their promise in writing to deliver them to him on the day of upon his demand, as by said receipt or writing, etc. That they never delivered said cattle, although specially demanded on said day; whereby he is become liable to pay said execution, to his damage £90. Demurrer. Judgment of the Common Pleas — That the declaration was sufficient.

Errors assigned were — 1st. It appears that the cattle were the property of Monroe, one of the defendants; and it doth not appear that said Peck ever posted said cattle as the law directs. 2d. There is no averment in the declaration that said judgment and execution remain unpaid and unreversed. Plea — Nothing erroneous.

Judgment — That there is nothing erroneous in the judgment complained of.

By the COURT. The action is brought upon a special undertaking and promise. The presumption is, that the officer has done his duty, unless the contrary is averred. The allegations supposed to be wanting in the declaration, are not necessary; and if the defendants would avail themselves of them, they ought to have plead the payment or reversal in bar, and that the goods were returned to the owner. Same point adjudged in an action brought by Hartshorn, an officer, upon a receipt for a horse taken on execution, against Halsey, at New London, September 1784.

This judgment was affirmed in the Supreme Court of Errors.

CHEESBOROUGH v. CLARK AND FANNING.

It is no objection to the title under the levy of an execution, that it was taken out sooner than it was agreed to have been — nor that one of the appraisers, was tenant to the defendant; where both parties knowingly agreed to have him.

By next assistant, etc. to be applied to, to appoint an appraiser, is not to be understood strictly the nearest, but one near by in the same town.

ACTION of ejectment. Plea not guilty to jury. Plaintiff's title — The levy of an execution upon said Fanning's land; to which levy, three exceptions were taken by the defendant: 1st. That by a written agreement the execution was not to have been taken out so soon by two months, as it was. 2d. That William Williams, Esq. who appointed one of the appraisers, was not the nearest justice to the land who could judge between the parties. 3d. That the appraiser chosen by the debtor, and agreed to by the creditor was tenant to the debtor, and not an indifferent person.

By the COURT. As to the first exception such agreement between the parties is not admissible on this issue to defeat the title. By next justice, in the statute is not meant strictly the nearest, but some one in the town where the land lies. As to the third exception, there is no law that excludes a tenant from being an appraiser of land, taken on execution; and where the parties having knowingly and understandingly agreed upon him, as in the present case, both parties knew he was tenant; they are estopped to say he is not indifferent, especially the debtor, whose tenant he was, and who chose him.

Verdict and judgment for the plaintiff.

CHURCH, EXECUTOR OF ———, v. RHODES.

Accord and satisfaction cannot be given in evidence under the plea of full payment.

ACTION on note. Plea full payment. Issue to the court.

The defendant proved that he sold and delivered a quantity of cheese to the testator, more than to the amount of said note, which was agreed to be received on said note.

Judgment for the plaintiff — Because the proof did not

answer the issue; he ought to have plead it by way of accord and satisfaction; no collateral article can be payment of a money debt, although it may be delivered and received in satisfaction by the accord and agreement of the plaintiff.

VAIL v. MUMFORD.

*Indebitatus assumpsit* will not lie upon a judgment. It is no defense to an action against an absconding debtor that the persons copied, are not his agents or factors.

ACTION of *indebitatus assumpsit* upon a judgment brought against Mumford, as an absconding debtor — setting forth the judgment, execution and a return of *non est* upon it — also, it is averred, that said Mumford had secreted his property, and had absconded; whereupon the defendant became liable, etc. did assume, etc. copies were directed to be left with certain persons who were agents, factors, etc. of said Mumford.

Plea in bar — That said persons were not, nor are agents, etc. to the defendant. Demurrer.

Judgment — Plea sufficient, upon the ground solely of the insufficiency of the declaration; for *indebitatus assumpsit* will not lie upon a judgment. Cower 128. For it is no objection to the plaintiffs having judgment against the defendant, that the persons copied are not his agents and factors.

MINOR v. KNOWLES.

No damages are to be given in a prosecution on the statute for a forcible entry and detainer.

ERROR to reverse a judgment of two justices on an information *qui tam*, for a forcible entry and detainer, wherein the court awarded damages to the party.

Judgment reversed as to the damages only.

The statute is — That the party grieved shall recover treble damages and cost by action of trespass, etc. but no damages are to be given, on such information, for the forcible entry, etc.

NOYES v. MOOR.

An agreement concerning lands executed on one part, is not within the Statute of Frauds and Perjuries.

ACTION of *assumpsit*, declaring — That in April last, the defendant applied to the plaintiff to procure for him a deed

from John Bacon and wife of a tract of land, particularly described, through which ran a stream of water, and the privilege of raising the water three feet higher, than a dam then standing on Joshua Powers's land; and proposed and engaged that in case the plaintiff would procure for him said deed, he would give his note for such sum as Messrs. Seldon, Eli and Lewis should appraise it to be worth; to which the plaintiff agreed, and promised to procure said deed from said Bacon and wife of said land and privilege, for the defendant, on or before the second Tuesday of June then next; and the defendant in consideration thereof, assumed and promised to give his note to the plaintiff, upon said deed's being procured for the sum it should be estimated to be worth by said Seldon, etc. And the plaintiff says that said Seldon, etc. estimated it to be worth £83 lawful money; and before said second Tuesday, viz. on the 10th of said June, he procured and offered and tendered to the defendant a good authentic deed of said land and privilege from said John Bacon and wife, and ever since hath stood ready to deliver said deed, and in all things hath performed on his part; and the defendant refused to give his note as aforesaid, or in any way or manner to perform his promise, etc. damage £100, per writ dated 2d of October A. D. 1788.

Plea in bar — That said contract was for the transferring of lands and for no other consideration and was not reduced to writing, nor any memorandum thereof made; and by the Statute to Prevent Frauds and Perjuries no action is maintainable upon it. Demurrer to the plea.

Judgment — Plea insufficient.

By the Court. This action is not within the statute; which extends to executory agreements and not to agreements executed on one part as this is; nor does the law mean to put it in the power of the defendant to take advantage of his own wrong to impose a gross fraud upon the plaintiff, as would be the case, if after the plaintiff had procured a deed from said Bacon, etc. to the defendant and paid or given security for the land, the defendant might be at liberty to depart from his agreement.

This statute is nearly a copy of a statute in Great Britain, made the 29th of Charles II. almost 100 years before; which by a long course of decisions had obtained a settled meaning and construction, with which the legislature of Connecticut, it must be supposed, were acquainted; and which will afford much light in the construction of ours. That a parol agreement concerning land, executed on one part is not within either the letter or the spirit of the statute which contemplated parol agreements, merely executory, is clear; for where the money is paid, or the deed is given, and the agreement executed on one part, natural justice requires that the other part should be performed:— And in such case, the proof of the agreement does not stand upon parol evidence only; but upon the execution on one part.

Accordingly it was adjudged at New Haven, February term, A. D. 1773, in an action of *assumpsit*, brought by Submit Tainter against Joseph Brockway, declaring that in consideration of £600 lawful money, which the plaintiff promised to pay the defendant for a certain farm, described in the declaration, and of $3 earnest money in part received by him, he assumed and promised to give her a deed of said farm in a fortnight, etc. which he had not done. The defendant plead the statute in bar; and that said agreement was by parol and no memorandum made of it in writing; and a demurrer to the plea. The judgment was — That the plea was sufficient; the agreement set forth in the declaration, is clearly within the statute, and the payment of the $3 earnest money, as it is called, is not such an execution on one part, as to take it out of the statute.

And it was determined at Hartford adjourned Superior Court, A. D. 1777, on a writ of error, brought by Oliver Clark v. William Brown and wife, to reverse a judgment of the County Court, in an action, Brown and wife v. Clark; declaring that in consideration of a deed of a certain piece of land executed to said Clark, by the wife of said Brown, when a *feme sole;* said Clark assumed and promised to pay her £14 lawful money, which he had never performed. The de-

fendant demurred to the declaration, and judgment of the County Court, that the declaration was sufficient, and for the plaintiff to recover.

Errors assigned — 1st. That there is no direct averment that said deed was ever delivered. 2d. That the promise is by parol and within the Statute to Prevent Frauds and Perjuries.

Judgment of the Superior Court — That there is nothing erroneous, in the judgment complained of. For upon a general demurrer advantage is not to be taken of the statute, for there may be a memorandum in writing which may be produced in evidence, that is not alleged in the declaration. But further, this action is not within the statute; for it is not laid upon the parol agreement only, but upon the agreement executed on one part. Gilb. Court Chancery, 231; 1 Bac. Ab. 74 and 75; 2 Stra. 785; 1 Blac. Rep. 600; and Chapman v. Allin, adjudged at Windham, March Term, A. D. 1788, Kirby's Reports 399.

This judgment of Noyes v. Moor was reversed in the Supreme Court of Errors. The reasons have not been given as I have been able to find.

### Mumford et al. v. Buel.

A note executed on Saturday night, between the hours of 11 and 12 p. m. is good.

Error to reverse a judgment of the County Court, in an action brought by Buel v. Mumford, on a note, dated the 31st of May, A. D. 1788.

Plea in bar — That said 31st of May was Saturday, and that after the setting of the sun, and the darkness had comprehended the light on said day, said Buel caused said Mumford to be taken on an execution in his favor; and to procure said Mumford's release from said arrest, said note was given and executed between the hours of eleven and twelve at night; which time was part and parcel of the Sabbath or Lord's day,

and is void. Demurrer — Judgment of the County Court that said plea is insufficient, and for the plaintiff to recover.

Error assigned — That said County Court ought to have adjudged said plea sufficient.

Judgment — Nothing erroneous.

By the Court. All people agree, that the artificial or solar day is the Sabbath; and that the Sabbath includes the whole of the natural day of twenty-four hours — but whether it includes the evening and night preceding, or any part of it, or the evening and night succeeding, is a matter about which mankind differ; and undoubtedly the law meant to allow them liberty of conscience, in case they do not disturb others.

The law forbids all secular business upon the Lord's day, under a penalty; it forbids all diversions and assembling together at taverns, and in the streets on Saturday evenings after sunset; on the Lord's day; and on Sabbath day evenings: By this it is clear that the legislature meant by Lord's day, the artificial day, and all arrests made on the Lord's day, are declared to be void. This transaction being at a time when the statute has not forbid the doing of secular business, nor declared it to be void; the court cannot adjudge it to be so; especially as it would be to enable the defendant to take advantage of his own wrong act, to injure the plaintiff.

### Brewster v. Town of Norwich.

**The property of goods is vested in the defendant by the plaintiff's recovering pay of him for them — and an action of book-debt will lie for them.**

Action of debt on book. Plea owe nothing. Issue to the jury.

The jury found that the plaintiff had in his hands four barrels of beef, the property of the defendants, for which he gave his receipt; that in A. D. 1784, he delivered said beef to the defendants' order, but did not take up his receipt; that the defendants brought a special action of the case upon said receipt, and recovered for said beef, and refer the question of law upon the facts aforesaid, to the court, whether the

defendants are indebted to the plaintiff for said beef, and whether it may be recovered in this action.

The court is of opinion — That the law is so upon the facts aforesaid, that said beef is chargeable on book, and recoverable in this action; the defendants having recovered on the receipt pay for said beef, the property thereby was vested in the plaintiff; and they having received it by delivery of the plaintiff, are justly indebted for it.

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**MIDDLESEX COUNTY, JANUARY TERM, A. D. 1790.**

Hon. ELIPHALET DYER, Esq., *Chief Judge.*

[Appointed upon Judge Law's appointment to the office of District Judge.]

*Judges.*

Hon. ANDREW ADAMS, Esq., Hon. CHARLES CHAUNCY, Esq.,
Hon. JESSE ROOT, Esq., Hon. ERASTUS WOLCOTT, Esq.

CHAMPION V. SPENCER ET AL.

In a writ of partition, the plaintiff must set forth the right and proportion he is entitled to in the estate, as a third, a fifth, etc.

WRIT OF PARTITION; declaring that the plaintiff and defendants were owners as tenants in common, of about 200 acres of land in East Haddam, and particularly described, in such manner and proportion that the plaintiff had right to have aparted and set out to him, in severalty, 14 acres 110 rods, equal in quality, situation, and privilege, with the rest of said land, and that the defendants have right to the remainder, etc.

Plea in abatement — 1st. That the plaintiff has not set out the proportions which the defendants have right to, among themselves. 2d. The declaration doth not state the proportion which the plaintiff is entitled to — but a certain quantity of land which may be impracticable to be set out to him.

Judgment — That the plea is sufficient, upon the last exception: It being immaterial and unnecessary to set out the defendants' proportions among themselves, for they may

not with a severance; but the plaintiff ought to have set forth the proportion he is entitled to have and hold in severalty.

SAGE v. ALSOP.

A special *indebitatus assumpsit* will lie for money paid by mistake in a settlement.

SPECIAL action of *indebitatus assumpsit* for £221 7s. 9d., paid by mistake, in a settlement of accounts in December A. D. 1767, and receipts passed.

The action judged to lie, and a recovery had by verdict of the jury.

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**NEW HAVEN COUNTY, JANUARY TERM, A. D. 1790.**

MILES v. TROOP.

On a plea in abatement of an appeal, because the value of the matters in dispute was under £20 — parol evidence to prove the value, not admissible.

ACTION of *assumpsit* for 2,000 feet of oars, which the defendant received to sell, and promised to account for the avails; value £30; damage demanded £40.

Plea in abatement of the appeal — That the oars, the only matter in dispute were not, nor are of the value of £20; and offered parol evidence to prove the value.

By the COURT. The evidence was not admitted; and the plea judged insufficient: It must appear from the record, what the value of the debt, damage, or other matter in dispute is, and the court will never go into proof to find the value, which is the province of the jury or triers to do upon a hearing on the merits.

SMITH v. BRADLEY.

What the law enjoins to be done, need not be inserted in the writ.

ACTION of *assumpsit*. Plea in abatement — That the writ contains no direction to the officer to return it. Judgment — Plea insufficient — The law requires him to return it.

BYARD v. STEWART.

The garnishee must be personally in court to testify upon a *scire facias*, if required by the plaintiff.

SCIRE FACIAS against Stewart as garnishee: Stewart put in his plea, and sent his account with his deposition annexed, which was objected to — and by the court it cannot be received; for by law the plaintiff has right to have him present in court, to cross examine.

NETLETON, ADMINISTRATOR OF SAMUEL NETLETON, v. BUCKINGHAM.

A defendant cannot take advantage of the parts of an award, which respects others and not himself. If it be good, as it respects him, he must perform it.

ERROR to reverse a judgment of the County Court, in an action brought by said administrator against said Buckingham, upon a submission and an award, between the plaintiff and defendant and the other heirs of said Samuel Netleton — demanding of the defendant £19 7s. 9d. the sum awarded for him to pay; alleging that the other heirs had performed their respective parts of the award. The defendant prayed oyer of the submission and award, and set them out upon the record and then demurred to the declaration.

The exceptions taken under the demurrer, were to parts of the award which did not respect the defendant, but the other heirs who had performed it. Judgment of the County Court was — That the declaration was insufficient, etc.

Error assigned — That said declaration ought to have been sufficient. Plea — Nothing erroneous.

Judgment — Manifest error.

By the COURT. It is not competent for the defendant to take advantage of any irregularity or obscurity in the award which respects other parties, and which they do not complain of, and have performed, when said award so far as it respects him is mutual, certain, and final.

SMITH v. BRADLEY.

It is no cause of arrest, that the jury have found a verdict upon insufficient evidence. A promise, which arises by operation of law, is not within the Statute of Frauds and Perjuries.

ACTION of the case, declaring — That on the 29th of April 1781 the defendant received of the plaintiff a pay-table order for £200 in state bills, which he received of Col. Champion and was accountable to him for; that the defendant in consideration thereof, promised to account to Col. Champion for it; that he hath never accounted to said Champion for it, but the plaintiff hath been compelled to pay said Champion for said order damage £133. Issue to the jury on the plea of *nonassumpsit*, and verdict for plaintiff.

Defendant moves in arrest, the insufficiency of the declaration, being upon a parol promise made in A. D. 1781, more than three years before the date of the plaintiff's writ. And by the Statute against Frauds and Perjuries said action is not maintainable.

Judgment — That the motion in arrest is insufficient.

By the COURT. It is no cause of arrest that the jury have found their verdict upon insufficient evidence, for they are judges of the weight of evidence. Woodruff v. Whittlesey, Kirby, 61. The consideration of the promise is laid to have been in April A. D. 1781, but the promise did not arise until the plaintiff was compelled to pay Col. Champion said order; and it was a promise or obligation which the law raised from the natural equity of the transaction, and not within said statute.

BUEL v. FABRICK ET AL.

To entitle the City Court to jurisdiction, it must appear, that the plaintiff or defendant was acutally residing within the city, when the cause of action arose.

ACTION of assault and battery, brought to the City Court, New Haven. Plea in abatement — That there is no direct averment that either of the parties were actually living and residing in said city at the time said cause of action arose.

Judgment — Plea insufficient. Although it is necessary to entitle the City Court to jurisdiction that this should appear;

yet the court was of opinion, that the averments in the declaration amounted to that.

SLOAN'S APPEAL FROM PROBATE.

**Appeal from probate judgment disaffirmed, no cost allowed.**

APPEAL from a judgment of the Court of Probate, making distribution of Daniel Mansfield's estate. Judgment of the Court of Probate disaffirmed, and no cost allowed; upon the ground that an appeal from probate is in nature of a writ of error; and it would in ordinary cases, be unreasonable the party should pay cost for the error of the judge — but when it appears that the mistake is caused by the fraud or negligence of the adverse party, it would be reasonable to allow cost.

HALL V. FITCH, SHERIFF.

**A bondsman may be relieved by an *audita querela*, against the debt in a judgment recovered against him, for the escape of a prisoner: where the original creditor's right of action, is barred against the sheriff, by the Statute of Limitation.**

AUDITA QUERELA, praying to be relieved from a certain execution which the sheriff had against him; which was obtained upon a bond, conditioned that one Cook should abide a faithful prisoner, on the ground that the sheriff's right of recovering the money, arose from his liability to the creditor; and that the creditor's right of recovering against the sheriff, in this case, was extinguished and barred by law.

Judgment — That he be relieved as to the debt in the execution only. 1 Bac. Ab. 198; Cro. Ja. 337.

SMITH V. ISAACS.

**Title to lands by a fifteen years' possession, may be acquired, under certain circumstances, without being actually inclosed by a fence.**

ACTION of ejectment for a piece of land. Plea not guilty. Issue to the jury.

Case was — Deodat Johnson owned a tract of land containing this and as much more lying together with it: The defendant and Benjamin Douglass late of New Haven, purchased of said Johnson the whole of said lands between them, each paid one-half of the purchase money and were to have one-half of the land: That for some reasons, a deed was given

of the whole land to said Douglass: That said Douglass and Isaacs soon after and more than fifteen years before the date and impetration of the plaintiff's writ, run a division line between their several parts and improvements, and that said land has ever since been used, improved and possessed by the defendant, in severalty, excluding said Douglass and all claiming under him and all others therefrom; and said Douglass and those claiming under him have improved the other moiety up to said division line in severalty, but no fence was ever erected on said line.

Question of law upon the facts aforesaid was — Whether this was such a possession under all the circumstances as barred the plaintiff by force of the statute. Verdict for the defendant.

By the Court. The reason which the statute goes upon is, that, a fifteen years' possession, taking all the profits, and holding all others out, and the owner, being under no incapacity, looking on, and making no claim or challenge, during that period, furnishes the strongest evidence, arising from the acts of both parties, that the right of property is in the possessor, and all persons are estopped from laying claim to it. Lands being inclosed within a fence, is evidence, though not the only evidence, of the possessor's having appropriated it to himself in exclusion of all others; for this may be proved by other evidence, as the case may be circumstanced, and as the present case is.

Judgment for the defendant.

### State v. Orsborn.

**On an information for passing counterfeit money, no evidence of its being counterfeit is admissible, except the confession of the prisoner, until the money is produced in court.**

Information for passing a counterfeit sixteen-penny piece. Trial to the jury.

The piece of money was not produced; it was objected, that no evidence ought to be received respecting the piece being counterfeit, unless the piece was produced in court.

By the Court. The evidence is not admissible.

**FAIRFIELD COUNTY, JANUARY TERM, A. D. 1790.**

BENEDICT v. HOIT, A CONSTABLE.

**In an action for an escape upon an execution, if a receipt is taken, no appeal lies.**

ACTION for an escape; declaring, that he delivered to the defendant an execution which issued from the County Court, against Lawrence, to execute and collect, and took his receipt therefor in writing, dated, etc. That the defendant levied said execution on the body of said Lawrence, and suffered him to escape, etc. said execution was for more than £20.

Plea in abatement of the appeal — That there was a receipt given for said execution, which is set forth in the declaration.

Judgment — Plea sufficient; for the statute in such case is express that no appeal shall be allowed.

LOCKWOOD v. KNAP.

**The court will not lend their aid to assist a party in an illicit transaction.**

ACTION of debt by book. Issue to jury. The book was for a quantity of goods, about £1200 worth, which were smuggled out of New York in A. D. 1781, when the enemy were in possession of it. Lockwood had a commissioned boat under the government, and upon a preconcerted plan, the goods were to be sent out, and Lockwood was to take them and have them condemned, for which he was to receive £100, he accordingly took them, libeled and had them condemned, for which he received his £100, and all charges, and delivered the goods to the defendant under this color of a sale; he charged the defendant in debt for them, and now brings this action.

Verdict for the defendant, and accepted by the court — The justice of the plaintiff's claim is very doubtful; but it is clear that it was an illicit transaction, to which this court will give no aid.

M'DONALD v. HOBBY ET AL. SELECTMEN OF GREENWICH.

In a prosecution for maintenance of a bastard child, by the selectmen, the deposition of the mother, taken before any suit was commenced, and without notifying the defendant who lived within six miles, is not admissible evidence, although the mother is dead.

ERROR, to reverse a judgment of the County Court, in a prosecution instituted by said selectmen, in their own names, for maintenance of a bastard child, said to have been begotten by said Lewis, on the body of one Elizabeth Ferriss, a pauper, since deceased.

In the trial of said cause the plaintiffs offered, and the court admitted, although objected to, the deposition of said Elizabeth, taken by Justice Mead, before any complaint was exhibited; the adverse party not cited nor present; although he lived within six miles of the justice: The court also admitted said justice to testify that said Elizabeth did at the time aforesaid on oath, charge said Lewis with being the father of said bastard child; the said Elizabeth being dead. A bill of exceptions was filed.

Errors assigned were — That said court ought not to have admitted said deposition; nor said Justice Mead, to testify what she had sworn before him.

Plea — Nothing erroneous. Judgment — Manifest error.

By the COURT. The deposition of said Elizabeth was extrajudicially and illegally taken, and could never have been admitted as evidence; and her death could not help the matter.

This judgment was affirmed in the Supreme Court of Errors.

**LITCHFIELD COUNTY, FEBRUARY TERM, A. D. 1790.**

SCOTT V. STATE.

**New trial granted on an information for passing counterfeit money, on the ground of new-discovered evidence.**

A NEW trial was granted on the petition of said Scott, who was convicted last court of passing counterfeit money, on the ground of having discovered new evidence.

HAWLEY V. COUNTY OF LITCHFIELD.

**In an action for an escape through the insufficiency of the gaol, special damages only were given.**

ACTION for the escape of Benajah Hawley, who was in prison on an execution, and escaped through the insufficiency of the gaol: Judgment against the county, and for £20, the special damages only; the execution being for a much greater sum. See Staphorse v. County of New Haven, August Term, A. D. 1789.

RATCLIFF V. DEWIT.

**An action on book depending, is no bar to the defendant's suing the plaintiff on book.**

ACTION of debt on book. Plea in abatement — An action commenced by the defendant against the plaintiff, before the date and impetration of the plaintiff's writ, which is now depending.

Judgment — Plea insufficient.

And by the COURT. Although a defendant in an action of book may recover the balance due to him; yet a debtor on book may commence an action on purpose to prevent his creditor from attaching, to secure his debt; or bring his action before a justice, where he can recover but £4; or if brought to the County Court, he may lay his damage so low, as to prevent an appeal.

TOWN OF CANAAN V. TOWN OF SALISBURY.

**A bastard child is settled with the mother.**

ACTION for supporting Tom, a bastard child. Issue to the jury.

The case was — The mother of Tom was settled in Salisbury; she went from that place pregnant with Tom to Norfolk, was warned out; and as she was traveling back through Canaan to Salisbury, Tom was born in Canaan, and is a bastard.

Question was — Whether Tom was settled in Canaan, where born, or in Salisbury with his mother. Verdict for plaintiffs.

And by the Court. Although by the laws of England, a bastard is settled where born, unless the mother is illegally thrust out; yet by the laws of this state, a bastard is settled with the mother, and this is agreeable to the law of nature and reason.

ST. JOHN V. SMITH.

**A debt assigned is the property of the assignee, and not liable to the creditors of the assignor.**

AUDITA QUERELA to be relieved against three executions, in favor of said Smith, against him, for £59 11s. 8d. in all; issued on judgments obtained in March, A. D. 1787. Sheriff Lord had executions at that time in his hands against said Smith to that amount, which had run out, and he become liable to pay: Smith verbally agreed and assigned over said judgments and executions against said St. John, to said Lord for his indemnity, and to pay him, which said Sheriff Lord accepted; and said Smith afterwards absconded out of this state: Huffman and Watson, creditors to said Smith, commenced suits against him, and copied St. John as debtor to said Smith, and were prosecuting said suits to recover the money of said St. John: Sheriff Lord had taken out said three executions, and levied them on the property of said St. John. Now he brings this writ to be relieved against the levy of said executions, on the ground that he was liable to Huffman and Watson.

Plea — not guilty. Judgment — That the defendant is not guilty.

Two questions were made — 1st. Whether a debt by execution may be assigned by parol agreement so as to transfer

the property — 2d. Whether a debt assigned is liable to the creditors of the assignor who has absconded.

By the COURT. As to the debtor, it is immaterial to whom he pays the debt; provided he is thereby discharged. The parol assignment is good between Lord and Smith to authorize Lord to collect the money and convert it to the payment of the debt due to him from Smith, and Smith can never recover it from him; and St. John being compelled by the executions to pay said debt, must be thereby exonerated. Huffman and Watson afterwards attaching the debt did not alter the situation of it, which before, in equity at least, was the property of Lord; and it would be very unreasonable to take money from one honest creditor, who has a prior right, to give it to another. Besides, Huffman and Watson can have no better right than Smith had at the time of leaving their copies in service, at which time Smith had no right at all.

This point was determined on a special verdict above forty years ago at Hartford, in the case of Wells v. Pitkin, sheriff. One Josiah Troop was indebted to Chamberlain — assigned to him a note against Amos Fellows and absconded. Wells at the same time had an execution against Troop. Chamberlain recovered a judgment and execution in Troop's name on the assigned note — put it into an officer's hands — Wells had his execution renewed and put it into the same officer's hands, and ordered him to levy it upon the money which he received on the execution that was assigned to Chamberlain, which said officer refused to do and returned said Wells's execution *non est*. The action was brought for a false return. Upon these facts the judgment of the court was — That the defendant was not guilty.

And in the case of Redfield v. Hillhouse, determined at New Haven, August A. D. 1774; which was — Isaac Colton assigned a note against Hull to William Colton, in payment for a horse. William delivered the note to Hillhouse as an attorney to collect — who collected the money. Redfield instituted his suit against Isaac Colton as an absconding debtor, copies Hillhouse, and recovers a judgment against said Isaac,

takes out an execution and has it returned *non est*, and then brings his *scire facias* against Hillhouse. Question was — Whose was the property of the money at the time of leaving said copy. Judgment of the court — That said Hillhouse was not agent and factor to said Isaac, etc. The property of the money being in William Colton, the assignee.

### Sheldon v. County of Litchfield.

**An action at law will not lie against a county, but a petition on the statute.**

Action on a protested order, drawn by the County Court upon the county treasurer, in favor of the plaintiff. Demurrer to the declaration, on the ground that an action at common law will not lie against the county; but that the plaintiff's remedy is by petition to the County Court, agreeable to the statute respecting prisoners escaping through the insufficiency of the gaol.

Judgment — That the declaration is insufficient.

### Lord, sheriff, v. Parmela.

**The sheriff has no right to take a bond that his prisoner shall abide in gaol, until he pays the gaoler for his board.**

**The sum claimed by the plaintiff on trial, to remain unpaid, being under £20 has no influence upon the right of appeal.**

Action on bond for £130, conditioned that one Sharp should abide a faithful prisoner and not depart said gaol until he had paid said execution, sheriff's and gaoler's fees, and also paid the gaoler for victualing him, etc. Damage £130. Plea *nil debet*. Issue to the jury.

It was admitted on the trial that the execution and lawful fees were paid; but that there remained due about £4 for victuals, board, etc.

By the Court. That part of the condition is illegal and void; and verdict was for the defendant.

Plaintiff moved in arrest — That no more than £4 was claimed to be due; which did not bring the cause within the jurisdiction of this court, the cause was appealed by the defendant.

Judgment — That the motion in arrest is insufficient. The bond and demand is £130. The plaintiff's admission upon the trial, that the execution and cost was paid, supersedes the necessity of proof, but doth not alter the jurisdiction of the court, which appears of record, nor the right of the parties. Besides, it would be allowing the plaintiff to take advantage of his own wrong.

LEAVET AND TWO OTHERS v. SHERMAN.

**An action will not lie in favor of three partners in trade, for an illegal arrest and imprisonment of two of them, upon an obligation given by them all, unless it appears that they are injured in their joint interest.**

ACTION of the case, declaring — That on the 8th of July A. D. 1787 they were neighbors to the defendant and dwellers in the town of Washington, in this state, and had sufficient estate there to pay all their debts; that the defendant wickedly and maliciously, intending to injure the plaintiffs in their interest and reputation, caused two of them to be publicly arrested in the streets of New York, in a suit brought before the City Court, upon an obligation for £170, executed by them jointly, to the defendant — whereby they were injured in their persons, reputation and property, to their damage, etc. The defendant demurred to the declaration.

Judgment — That the declaration is insufficient.

By the COURT. Two of the plaintiffs being arrested in New York is no cause why the other, who was not arrested, should join in this action for a personal injury. And their being joint traders cannot help the matter, unless they had shown that they had sustained some special injury in their trade and concerns, which they have not done.

SMITH, EXECUTOR OF DANIEL GRANT, v. MARSHALL ET AL.

**A legacy given by will is not to be considered a satisfaction for a sum secured by a note; unless expressed, or necessarily implied to be so.**

WRIT OF ERROR, complaining — That said Raphael et al. brought their action against him as executor aforesaid, to

the County Court, on a note executed by said Daniel, on the 18th day of July, A. D. 1787, for £700 lawful money, to the said Phila, payable on demand with lawful interest — demanding £ lawful money damages.

To which action said executor plead in bar — That said Daniel executed said note in his last sickness and but a day or two before his death, as a gratuity to said Phila and delivered it to Elihu Barber to hold and deliver to her after his death, and so said note was to operate as a pecuniary legacy; and said Daniel attempted to settle all his estate by notes, but finding it impracticable, he afterwards made and published his last will and testament, in and by which he gave to said Phila £700, the same sum contained in the note, and made a legal disposition of all his estate, which will has been proved and approved; and the defendant has fully paid and satisfied to the plaintiffs said £700 mentioned in said will, being the whole which was meant and intended to be given to her.

Plaintiffs reply — That said Phila is the natural daughter of said Daniel, and that said Daniel in contemplation of death gave her the note, on which, etc. for the purpose of providing for her support, and soon after made and published his will, and therein gave her £700, to be paid her in articles of estate to that amount, at inventory price, to be set off to her by distributors, appointed by the Court of Probate; that said estate as inventoried, consisted of real and personal estate, notes, etc.

The defendant rejoins — That said Daniel, when he delivered said note to said Barber, declared that that sum was sufficient for her well-being in life; and had often been heard to say, he intended to give her that sum; and affirms over his plea in bar. Plaintiffs demur.

Judgment — That the defendant's rejoinder is insufficient; and for the plaintiffs to recover.

Errors assigned — 1st. That as the method of settling his estate by note was relinquished, and a will resorted to, and made, this note with all others, were rendered void. 2d. That said note being in nature of a pecuniary legacy, was revoked

by the will. 3d. The sum in the note, and the sum in the will being the same, it is evident that but one £700 was intended to be given her, and that a payment of one was a satisfaction for both. 4th. That as said note was an escrow and derived all its force from its second delivery, which was not till after said Daniel's death, it cannot be a charge against his estate.

Judgment — Nothing erroneous.

By the COURT. By the note's being executed and delivered to Barber with instructions to him to deliver it to said Phila after said Daniel's death, she became interested in it; and said Daniel could not vacate or revoke it by will or otherwise; and although said note did not take effect until the second delivery, yet upon the second delivery it had effect and operation from the date, and was a lien upon his estate, as much as any obligation, or any legacy in his will, which did not take effect until his death. The consideration was a good one; it was the love and affection he had for his natural daughter, given for her support, and advancement in life, and to compensate as far as was in his power, for the disadvantages accruing from the defect in her birth, of which he was the blamable cause. In all cases where a legacy is to be considered as a satisfaction for a debt, it must be for as great a sum as the debt, and of equal value at least.

The note is for £700 lawful money, payable on demand with the lawful interest; the sum given by the will is to be paid in articles of estate at inventory price, to be set out by distributors, without interest.

The two sums are totally different in their nature and value, given at different times, and by different instruments, and it is impossible they should be considered the same: or that payment of one should be a satisfaction for the other: Indeed had both sums been given by the will, they must have been considered distinct legacies, and both had effect.

PHELPS V. MILES ET AL.

An action in favor of a creditor to a deceased man; will not lie against his heirs or legatees as such.

WRIT OF ERROR; complaining of a judgment of a justice in an action brought by said Miles et al. v. Phelps, as heir to Abel Phelps, upon a bond executed by said Abel to the plaintiff, for £8 19s., dated 29th of August, A. D. 1754; averring that the defendant had received of his father, said Abel, by gift and by legacies, more than sufficient to pay said debt.

Said Elijah plead in bar — That he did not receive of his father any legacy at his death, as the plaintiffs have alleged; and as to the rest of the declaration he says it is insufficient. To this plea the plaintiffs demurred. The justice gave judgment, that the plea was insufficient; and for plaintiffs to recover £8.

Errors assigned — 1st. That no such action is maintainable against an heir or legatee. 2d. If it is, it must appear, that the party has no other remedy. 3d. It appears that said Elijah received no legacy from his father.

Judgment — Manifest error.

By the COURT. In England the personal estate only is assets in the hands of an executor, the real estate descends to the heir-at-law, and is liable to creditors by specialty only in the hands of the heir, in case the personal estate proves insufficient.

But by the laws of this state the real estate as well as the personal, is charged with the payment of debts generally, if the personal is not sufficient, the real estate is assets in the hands of the executors, etc. and may be sold by them for the payment of debts; and the heirs cannot hold against such sale; the necessity therefore, of an action against the heirs, is wholly superseded by the law relative to the settlement of estates; but upon no principle are the plaintiffs entitled to a recovery upon this declaration and pleadings.

SCOT v. TURNER.

The jurisdiction of a justice to inflict a penalty or fine is limited to forty shillings.

A conviction for a second offense, which incurs an accumulated penalty, must be for the same kind of offense.

Where part of the charges in a declaration are answered by a special plea in bar, and not guilty is plead as to the rest, and the parties join in a demurrer to the special plea and issue upon not guilty — both must be answered in the judgment.

WRIT OF ERROR; complaining of a judgment of the County Court, in an action of debt brought by Turner against Scot, upon the statute for regulating taverns, etc. and for suppressing unlicensed houses, etc. for the £6 penalty given for the second offense, alleging that he had sold victuals by the meal, hay and provender for horses, and spirituous liquors, by less quantities than the law allows, without license, and that he had been before convicted of said offense before Justice Parmela, as by his records, etc. by which, they being recited in the plea in bar, it appeared that the conviction was for selling spirituous liquors only, before Justice Parmela, and the fine £3.

The defendant plead a contract he had made when a licensed tavern-keeper, with certain persons to furnish them with victuals, hay, and provender, in excuse for his doing it; and as to his selling spirituous liquors as charged, he says he is not guilty. The plaintiff demurred to the special plea, and joined issue upon the plea of not guilty. The County Court gave judgment, that the defendant's plea was insufficient, and for plaintiff to recover £6.

Errors assigned — 1st. That the offense Scott was convicted of before the justice, was for selling liquors, and the offense he was convicted of by demurrer before the County Court, was for selling victuals, hay, etc. which is a different offense. 2d. That said Justice Parmela had no jurisdiction to try and convict the said Scot of said first offense.

Judgment — Manifest error, for both the causes assigned.

By the COURT. The general issue was joined upon the only material point in the declaration, but not decided; a justice's jurisdiction, in criminal prosecutions is limited to forty shil-

lings only, except to commit or bind to a higher court; the proceedings therefore before Justice Parmela, are void, being *coram non judice.*

BACON v. SANFORD.

An action lies for a fraud, in the sale of an order drawn by selectmen on the town treasurer.

ACTION of the case, declaring that on the 17th of January, 1787, the defendant was possessed of two orders, drawn by the selectmen of Woodbury, on their treasurer: one for £67 10s. 2d., dated the 12th of January, A. D. 1779 — one for £43 10s., dated 15th of April, A. D. 1779, both expressed to be for lawful money — drawn in favor of Joseph Perry, and by him indorsed to the defendant; which orders were subject to be reduced by the scale, and were worth about £12 lawful money — which the defendant well knew — yet contriving to injure and defraud the plaintiff, did falsely affirm to Asahel, clerk and storekeeper to the plaintiff, to induce him to buy them, the plaintiff being then from home, that said orders were not liable to be reduced by the scale, but were equal in value to their nominal sum in lawful money — and the said Asahel, relying on the defendant's affirmation aforesaid, and being ignorant of their true value, did purchase said orders and paid the nominal sum in lawful money for them, out of the property of the plaintiff, etc. further alleging that he presented said orders to said town treasurer, and that he refused to accept or pay them — Damage £150.

Demurrer — Judgment that the declaration is sufficient, and that the plaintiff recover.

Exceptions to the declaration were — That it is double; laid upon the fraud and upon the protest. 2d. That neither are sufficient to warrant a recovery.

By the COURT. The declaration is not double; it is laid upon the fraud, and its being mentioned in the declaration, that the orders had been refused payment, was immaterial, was not to the point of the action, but to the damages only.

Although the value of public securities and state orders is a matter of public notoriety, equally known to the buyer as the

seller; yet this is not the case with orders drawn by the selectmen of a town, or by individuals: their value is presumed to be in the knowledge of the seller and not of the buyer.

SMITH V. TRAWL.

ERROR to reverse a judgment of the County Court, in an action Trawl v. Smith, declaring that one Jehiel Sexton was indebted to him £8 15s. by note; that to secure said debt, he caused a certain horse of said Sexton's to be attached of more value than said debt, by writ, dated and returnable before Justice Wilcox, to be answered on the 29th of January, A. D. 1787; that said horse was accordingly attached and taken into the custody of the law. That said Sexton applied to the defendant, he being a justice of the peace, for a writ of replevin to replevy said horse, which said justice granted, and took said Sexton's bond only upon said writ; that said Sexton at that time was a bankrupt, known to have but little or no property besides said horse; by virtue of which replevin said horse was taken out of the custody of the law and returned to said Sexton; that the plaintiff recovered judgment on said writ of attachment on said 29th day of January, A. D. 1787, before Justice Wilcox, for the sum of £1 15s., lawful money, damages, and thirteen shillings six pence for cost, for which he had execution and delivered it to an officer, who collected thereon fifteen shillings only, and for the residue returned said execution *non est inventus;* and said Sexton hath no estate and hath absconded; that his bond aforesaid was no security on said replevin, and by means of the wrongdoings of the defendant aforesaid he has lost his said debt to his damage £ .

Demurrer to the declaration — Judgment that the declaration was sufficient, and that the plaintiff recover.

Errors assigned — That said declaration was insufficient; for the law had made the justice the judge of the sufficiency or insufficiency of the security to be taken, and of this he judged, and for an error in judgment he was not liable.

Judgment — Manifest error.

BY the COURT. The question in this case is, whether the plaintiff's bond, upon a replevin, in any case, let him be ever

so responsible, can be considered as good and sufficient security, within the letter and meaning of the law. 2d. Whether, as the statute is worded, and the practice hath been, the justice is guilty of a malfeasance, for which he is liable in damages; or only as having committed an error in judgment.

The statute respecting attachments is, that the plaintiff, on praying out an attachment against the goods and the estate of the debtor, shall give sufficient security to prosecute. The parties' bond is constantly taken in these cases, and if the security is insufficient, an objection made to the court, to whom the writ is returned, will order a new bond to be given. The attachment takes the property from the defendant into the custody of the law, for the purpose of responding the judgment which shall be recovered; or to return it in safety to the debtor.

On praying out a replevin the law is, that the plaintiff shall give good and sufficient security to prosecute his replevin, etc. This writ is to take the property out of the custody of the law, and return it to the owner; it is to relieve a defendant against any injury he might sustain, by having his property detained from him; the bond is deposited in the place of the property, to respond the judgment. Now as the statute doth not explicitly require that it shall be a bond with surety, but only that it shall be good and sufficient security, if the justice judged that the plaintiff's bond was good and sufficient security, although, it in fact was not, and although it is not what the statute meant, in this case, by good and sufficient security, still it is but an error in judgment, for which he is not liable, unless it appeared, that he acted corruptly; and in this case it doth not appear that he did.

Dyer and Chauncey, JJ., dissented from the court and were of opinion, that although the words of the statute respecting attachments, and of the statute respecting replevins, were in substance the same; and that the practice had been to take the plaintiff's bond upon attachments; yet the cases were very different, and that in a replevin the party's bond is no security

at all, and it is as though the justice had granted a replevin without taking any bond at all. I should have stated their reasons at large, but have not been able upon diligent search to find them.

This judgment of the Superior Court was reversed in the Supreme Court of Errors, in May A. D. 1790; for the following reasons, viz.

Trawl v. Smith. The question in this case is — Whether the officer who issues a writ of replevin, has not a legal right to take the bond of the debtor only, who shall pray out such writ; and if such debtor shall fail in his prosecution, and be unable to respond the judgment which shall be rendered against him, such officer issuing such replevin, having judged the bond of the debtor only, sufficient in law, hath not therein acted consistent with his duty, and consequently is exonerated from any responsibility on account of such failure?

The law requires that good and sufficient security be given to prosecute a writ of replevin. To know what the law deems good and sufficient security, we must advert to the policy and design of the law relative to writs of attachment and writs of replevin. The obvious design of the law, allowing a person who claims to be a creditor, to attach the goods or person of his reputed debtor, is with a view to promote justice, by giving such creditor a more immediate and better security than he before had; and by such provision to extend the benefit of private credit, to such as may want it. Without such provision, a debtor might withdraw himself, and secrete his property, even under the eye of his creditor; and at the same time the creditor have no legal authority to prevent the fraud.

On the other hand, a man may be so unjust as to claim to be a creditor and attach the goods of another, against whom he has no legal demand; to guard against the inconvenience of such unjust seizure and detention, the law has provided, that such reputed debtor may have his goods restored to him, upon his giving sufficient security to return the goods, or respond

the judgment that shall be recovered against him. These two laws, established upon the clear principles of public and private utility, must be construed and understood to be reconcilable with each other; we must not therefore admit as a principle of law, what would manifestly defeat the beforementioned view and design of the law.

It was before observed, that one important design of the law in allowing creditors to attach the goods of their debtors was, that they might possess themselves of a better security, than they before had. With this idea in view, we will suppose a creditor attaches the goods of his debtor, upon a bond for money given to him, by such debtor; now if such debtor upon his proffering another bond, given by himself only, can by law claim and have a legal right to have his goods so attached restored to him; it must be evident, that he has a legal authority to defeat every advantage of such attachment, and subject the creditor to depend finally upon the bond of his debtor only, with no other advantage to himself, nor better security than he had before such attachment had issued. Such proceedings being so obviously repugnant and contradictory, cannot be admitted as consonant to law.

It is true, that every officer who is required to take bonds upon replevins, is to judge, whether the same be apparently sufficient or not, and is not responsible for such his judgment; but the bond offered must be apparently good, which cannot be the case if none is offered but the bond of the debtor only; because it must appear evidently, that no additional security can thereby be acquired by the creditor more than he had before. To say that a sheriff had let a man to bail upon his own bond, would be an impropriety in expression; and it would be equally so, to say, that a good and sufficient pledge was given, in lieu of the goods of the debtor, which were attached, when no other pledge was given but the bond of the debtor only, which necessarily cannot be any higher or better security, than the creditor had before the attachment issued.

SHERMAN V. LEVERET ET AL.

ACTION declaring that the defendants, on the 2d of October, A. D. 1786, made a written contract and bargain with the plaintiff, which is in the words following, viz. October 2d, A. D. 1786, agreed that David Leveret, Jr. and Co. give Peter Sherman £170 lawful money for his store, land and barn, in Washington; half to be paid next spring, in cash, when Sherman is to quit said store, and half the spring after, in good neat, salable cattle, with interest after next spring until paid. Peter Sherman, David Levert, Jr. and Co.— and the plaintiff says, that by said store, land and barn, mentioned in said writing, was meant the store then occupied by the plaintiff, and a small tract of land on which it stood and lay continguous to it, and a small barn standing thereon: and the plaintiff says that the defendants entered upon said land sometime in April, A. D. 1787, in pursuance of said written bargain and agreement, and improved the same, and the plaintiff quitted said store upon the request of the defendants, pursuant to said agreement, and fulfilled everything on his part to complete and carry the same into execution; but the defendants have wholly neglected to fulfill said bargain and contract on their part, and have never made said payments, promised in said agreement, although often requested — Damage £200, dated 15th November, A. D. 1788.

Plea — Not guilty. Issue to the court — Judgment that the defendants are not guilty.

LEVERET AND BELLAMY V. SHERMAN.

ACTION declaring that on the 2d of October, A. D. 1786, they purchased of the defendant a piece of land, lying in Washington, containing about three-quarters of an acre, together with a store and barn thereon standing, and that the plaintiffs and the defendant did enter into the following agreement, viz. Washington, October 2d, 1786, agreed that David

Leveret, Jr. and Co. give to Peter Sherman £170, lawful money, for his store, land and barn, in said Washington, one-half to be paid next spring, in cash, when said Sherman is to quit said store and execute a warranty deed of the same to said Leveret and Co. and half the spring following, in good neat cattle, on interest from the first payment till paid; and the plaintiffs say that the defendant did not quit said store nor execute a warranty deed to the plaintiffs in the spring succeeding October, A. D. 1786, according to said agreement, but continued in possession of said premises, and utterly refused to quit or convey the same to the plaintiffs, whereby an action has accrued to the plaintiffs to recover of the defendant their just damages, which is £100, lawful money, writ dated 15th November, A. D. 1788. Plea — Not guilty. Issue to the court.

Judgment — That the defendant is not guilty.

The two preceding cases were heard and tried by the court together, and upon the evidence, the court found that neither of the parties had performed or made any tender of performing their parts of the agreement. The question then came up, whether, as they were mutual covenants, one was the consideration of the other; and so a performance not necessary to be laid in the declaration, nor to be proved on the trial.

The defendants, in the first action, insisted that the plaintiff, by the stipulations in the agreement, was to do the first act, viz. was to quit the store, etc. and to give a deed of the premises the then next spring; when, and not till that was done, did the duty of paying arise; but it was the opinion of the court, that by the terms of the contract; the quitting the store, etc. and giving a deed of the premises, the then next spring, when half of the price was to be paid, were concurrent, concomitant acts, to be performed by each of the parties at the same time; and that neither had right to recover, without a performance of his or their part of the agreement, or at least an offer to perform it.

**HARTFORD COUNTY, FEBRUARY TERM, A. D. 1790.**

DEMING v. BRISTOL.

**A mortgage deed, by which more than lawful interest is secured is void by the statute.**

ACTION of ejectment. Plea in bar — That the plaintiff's title is a mortgage given for security of a debt, in and by which is taken and secured, by the corrupt agreement of the parties, a sum for the loan and forbearance over and above the lawful interest, etc. The jury find a verdict for the defendant.

The case was, Bristol and Hart set about building a sawmill, applied to the plaintiff and one Street to assist them, by loaning them money or goods; upon which it was agreed that Bristol and Hart should draw orders in favor of their workmen, payable in goods at cash price, upon Deming and Street, which they would accept and pay, and credit the defendants one year, for which they were to pay to the plaintiffs, etc. six shillings eight pence on the pound at the end of the year. Before the year was ended, they came upon the defendant and Hart, and obliged them to give the mortgage, and included the six shillings and eight pence on the pound, upon what they had advanced; and put the whole upon interest from that time.

Two questions were made — 1st. Is this a sale of goods upon a year's credit at an advance of six shillings and eight pence upon the pound, or a loan disguised? 2d. The plaintiff and Street's taking security before the year was up, and including interest from that time, upon said debt and advancement, was clearly over the lawful interest, and will justify the verdict of the jury.

STATE v. GIBBS.

**If an information for counterfeiting is not exhibited within a year from the commission of the offense, it is good cause for arresting judgment.**

INFORMATION for counterfeiting a final settlement note of $1,000.

Plea — Not guilty. Verdict — That he was guilty.

Motion in arrest — That said offense is laid in the information, and in fact was committed more than one whole year, before any legal prosecution was instituted against him.

Judgment — Motion sufficient, for the statute is positive that such information is void and of no effect.

CASE v. WORTHINGTON, EXECUTRIX OF ELIAS WORTHINGTON.

**Where an absolute deed is given of lands, as a security for a debt, a letter under the hand of the grantee, acknowledging said deed to be for security only, is a note in writing, which takes it out of the Statute against Frauds and Perjuries.**

PETITION in chancery — Showing that he executed to the said Elias a clear deed of the following piece of land, describes it, to secure the payment of certain executions said Elias held against him; that he had paid up all said executions; and that said Elias agreed to release to him his land, praying for relief, etc.

The respondent objected to any parol evidence being admitted. The petitioner produced a letter under the hand of the said Elias, acknowledging that said deed was given for security of said executions; also produced said executions, and it appeared they were not wholly paid.

The court decreed — That said executrix should release the land, upon the petitioner's paying £86 and the cost, etc.

PATTEN v. GOODWIN.

**Twelve days' notice is to be given to an author of a book, etc. who is complained of for not vending a sufficient number, or for asking an unreasonable price for them.**

PATTEN exhibited to the chief judge of the Superior Court, a complaint against said Goodwin, on the day before the sitting of this court, therein alleging that said Goodwin, in whom was the copyright of Webster's Institute of English Grammar, did not supply the public with a sufficient number of said books; and that he sold them at an exorbitant price, etc. contrary to the statute, entitled an act for the encouragement of literature and genius, etc. upon which a citation was granted and served the same day, citing said Goodwin to appear before this court, and answer to said complaint.

Plea in abatement — That there ought to be twelve days' notice.

Judgment — That the plea in abatement is sufficient.

TOLLAND COUNTY, MARCH TERM, 1790.

FOSTER v. HOUGH.

A witness used at the trial may be introduced as new, as to what has come to his knowledge since.

PETITION for new trial. The witnesses improved in the former trial were admitted as new as to those things only which had come to their knowledge since said former trial.

WOODBRIDGE v. GRANT.

In an action upon a probate bond, it is not necessary to set forth the condition in the declaration.

ACTION of debt, declaring on the penal part of a probate bond. Plea in abatement — That the plaintiff ought to have set forth the condition in his declaration.

Judgment — Plea insufficient. The condition is in favor of the defendant, and it is for his advantage to set it forth in his plea.

The decisions of the court respecting this point of practice, have not been uniform, to the prejudice of suitors. I think it is now settled upon principles of reason and common sense which will abide. It was determined and published as a rule of this court, that copies of the records of the courts in the other states must be under the seal of the court, attested by the clerk; with a certificate from some one of the judges at least, that he was clerk of the court. This was before the law of Congress upon this subject, was published.

FOOT ET AL. v. CADY.

The records of a justice cannot be amended, after the court is over, without there are some minutes in writing, to amend by. Every special issue to the court or jury, must be answered directly in the terms of it.

ERROR, complaining of a judgment of a justice in an action brought by Cady against said Foot et al., a society called Mr. Foster's adherents, for inserting his name in a rate-bill and collecting it, which was granted to pay Mr. Foster's salary.

The defendants plead — That they did insert his name in said rate-bill with his rate annexed to it and have collected it,

which they had good right to do; for that said Cady was one of Mr. Foster's adherents, and by the law constituting them a society was made liable to be taxed for his support.

The plaintiff traversed this plea, and issue was joined upon it; and said justice gave judgment, that the defendants did grant the tax and collect it without law or right, and that the plaintiff recover, etc.

Error assigned — That the justice has not found the issue one way or the other.

A motion was made that the justice might amend the record.

By the COURT. It may not be done unless he has some written minutes or memorandum to amend by.

Judgment — Manifest error. Every issue in fact joined to the court or jury must be directly answered. That the defendants laid and collected said tax without law and right, is an inference of law; but the most material fact put in issue, viz. that said Cady was one of Mr. Foster's adherents, the justice has not found, and without which it is impossible to know whether the inference he has made is right or wrong.

BRATTLE, ADMINISTRATOR OF WILLIAM BRATTLE, v. CONVERSE.

Neither the distribution of an estate to heirs, nor the death of the administrator, is a bar to granting administration, *de bonis non*, to a creditor.

APPEAL from probate, stating that Josiah Converse late of Stafford, deceased, owed a debt to Wm. Brattle; that said Converse's estate has never been settled nor said debt paid; that there is no administrator or executor to whom to apply for payment of said debt, although there is a plentiful estate; and said Brattle moved said court to appoint an administrator.

The appellees reply — That said Josiah died in A. D. 1775; that his widow was appointed administratrix, who advertised the creditors and paid off all debts that appeared; that said William went off to the enemy in A. D. 1776 and his said debt was not exhibited; that the remainder of said estate has been divided out among the heirs by agreement, acknowledged

and recorded at the Court of Probate; since which said administratrix has died and no further administration ought to be granted. The Court of Probate refused to grant said motion.

Judgment — That the denial of the Court of Probate be disaffirmed: No cost was allowed upon the principle adopted in the case of Mary Sloan, New Haven, this circuit.

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**WINDHAM COUNTY, MARCH TERM, 1790.**

TOWN OF WINDHAM v. TOWN OF HAMPTON.

**Signing and serving writs are ministerial acts and may be done by inhabitants of the town, who are plaintiffs.**

ACTION upon an *insimul computasset.* Plea in abatement — 1st. That said writ is granted and signed by Zephaniah Swift Esq. a justice of the peace, who is an inhabitant of the town of Windham, and one of the plaintiffs. 2d. That it is directed to, and was served by James Flint, as an indifferent person, who is also an inhabitant of Windham, and one of the plaintiffs. 3d. That said Flint hath not made oath to the service.

Judgment — Plea insufficient.

By the COURT. As to the two first exceptions, the signing and serving of the writ, are merely ministerial acts, and if any irregularity is practiced, advantage may be taken of it by pleading it. Besides, if members of corporations were wholly excluded from acts of this nature, there would be a failure of justice in many cases. As to the third exception, the law doth not require it; but if necessary it may be done after the writ is returned, by leave of the court.

AINSWORTH v. SESSIONS.

**A new trial is granted where the party is deprived of the testimony of a material witness, by his being disconcerted and losing his recollection from some cause or other not to be accounted for.**

PETITION for a new trial, upon the ground that one Payne, who was relied upon as a principal witness in the cause through surprise or some unaccountable cause, was so dis-

concerted and confused in his evidence, that neither court nor jury could understand him, whereby the petitioner lost his case, and that said Payne is now able to testify in the clearest manner, which will give the case to the petitioner, and states what he will testify.

Plea in abatement — That said Payne is not a new evidence, and to grant new trials upon the after recollection and additional testimony of former witnesses, would open too wide a door, and be of dangerous consequence.

Plea judged insufficient.

By the COURT. Although the objection in the plea is conclusive in all cases where it applies; but where a party is deprived of his most material evidence by some unaccountable cause, as by being panic struck, or by a paralytic shock, or other affection which for that time, has deranged the recollection of the witness so that the party loses the benefit of his testimony; this appearing clearly to be the case, reason and justice require that the party should be relieved against such a misfortune, by a new trial, as much as when he is deprived of his evidence by sickness or absence; but in such cases the court ought to be extremely cautious, that they be not imposed upon; this case was afterwards heard upon the merits, and a new trial granted.

## MARCY v. RUSS.

**The levy of an execution taken out upon a judgment by default, against a person out of the state, without giving bond agreeable to the statute, is error, of which the party only, may take advantage.**

ACTION of ejectment. Plea not guilty. Issue to the court. Plaintiff's title, the levy of an execution against Major Dana, upon this land as his, in December, A. D. 1788.

The defendant set up title from one Fletcher, who attached the land for a debt due him from Major Dana, who then was removed out of the state, in August, A. D. 1786; Fletcher obtained judgment by default, and took out execution without giving any bond as the law requires, and in September levied it on this land, and had it set off to him.

The only question in this case was — Whether Fletcher's taking out his execution without lodging a bond as the statute requires, was such an irregularity as made void the execution and levy. Judgment for the defendant.

And by the COURT. The bond with surety which is to be lodged with the clerk upon taking out execution on a judgment by default, against an absentee, is altogether in favor and for the security of the debtor, provided he returns into the state and seeks redress within a twelve month; but the creditors of such absentee cannot take advantage of it, the execution and levy therefore, are good and valid, as to all other persons besides the debtor.

WEBB v. FITCH AND CAREY, ADMINISTRATORS OF ELEAZER CARY.

A party cannot be a witness in his own favor, in chancery any more than at law.

Chancery will not relieve against an express statute, where no fraud or accident hath happened. The Court of Probate may lengthen the time of commissioners on an insolvent estate, provided it does not exceed eighteen months. Chancery will decree an offset of liquidated debts.

PETITION in chancery; showing, that he gave his note to said Eleazer for £28; that he made payment of nearly the whole of said note to said Cary, and charged it on book; that said Cary's estate was represented insolvent, and commissioners appointed; that he omitted to exhibit his book to the commissioners, by being told by one of the administrators that the payments should be allowed on the note; that said commission is expired, and the administrators have recovered judgment before this court for the whole sum of said note; praying that all parties may be admitted to testify, and that he may be relieved against the judgment on said note, as he is remediless at law.

By the COURT. The petitioner cannot be admitted to testify; and it not being shown that he is deprived of his due, by any fraud in said administrators, he is equally barred of his remedy in equity as at law; this court cannot resume and ad-

just claims which ought to have been exhibited to, and adjusted by commissioners.

Petitioner withdrew his petition, and replied to the Court of Probate, and had the commission of said commissioners renewed, and exhibited said debt to them, which they allowed, amounting to £10 19s. 2d. lawful money; and then the petitioner applied to this court in September, A. D. 1790, stating the aforesaid facts, and praying for an offset; which was decreed accordingly.

BORLAND v. SHARP.

A debt contracted before the war for which, a new note was given since the war, and before the statute, respecting absentees with the enemy, was made, is within the equity of the statute.

ERROR, complaining of a judgment of the County Court in an action Borland v. Sharp, on a note, dated 25th January A. D. 1784, for £157 10s. and interest.

The defendant plead — That on the 6th of October A. D. 1774, he became indebted to John Borland, since deceased, £100 payable with interest; that in April 1775 said John went to and joined the enemy and there remained until his death; that the defendant procured the money in bills to pay said debt, but was unable to get to him and lost the money by depreciation; and after the death of said John said note came into the hands of the plaintiff, who is son and heir of said John, who also was with the enemy, and there continued inaccessible by the defendant until the expiration of the war; that on the 23d of January A. D. 1784 the plaintiff applied to the defendant to renew his note which he did and included all the back interest, not knowing that he could have any relief — and prays for the relief which the statute provides. The County Court inquired into the facts and gave judgment that said debt is within the equity of the statute and expunged the interest from said debt during the war.

Errors assigned — 1st. That said note is not within the provisions of said statute. 2d. That said plea is insufficient. 3d. That said judgment is against law.

Judgment — Nothing erroneous. This is a debt contracted before the war; although the security was renewed since, yet debts are the object of the statute; had the note been renewed since the statute was made, the case would have been otherwise; but it was given when no such statute was thought of by the people in general. The debt now belonging to the heir makes no difference.

This judgment was affirmed in the Supreme Court of Errors.

GEER v. HOVY.

A minor is no more liable in chancery for fraud in a contract, than at law.

ERROR, to reverse a decree in chancery upon a petition Hovy v. Geer; showing that said Geer was a minor, under the age of twenty-one years; that he pretended he was of full age, and that the petitioner exchanged horses with him and was cheated by him, and that he is without remedy at law.

Plea in abatement — That the petitioner's remedy was equal in the law as in chancery; plea overruled; and the County Court upon a hearing, decreed that Geer should pay £10.

General errors — Judgment reversed, upon the ground that a minor is no more liable in equity than law for fraud in a contract, for if he is incapable of making, he is incapable of committing a fraud in a contract; besides, this would defeat the law made for the protection of minors; if, although they would not be liable upon their contracts yet by using deceit in them, they should be made liable.

TOWN OF MANSFIELD v. TOWN OF GRANBY.

A person who would have been settled in a new town, had he been at home, when it was formed, is settled there notwithstanding he was then absent, unless he has gained a settlement elsewhere.

ACTION of *assumpsit* for supporting Mary Basset a pauper. Plea — *nonassumpsit*. Issue to the court.

The case was — Said Mary was settled in that part of Symsbury which is now Granby; on the 15th of October 1786, she

came to Mansfield but gained no settlement there; in October A. D. 1786, Granby was incorporated into a town, and by the act of incorporation all the people living within its described limits, were to belong to the town of Granby; said Mary had moved away just before the act of incorporation passed, but had gained no settlement elsewhere; and had now become chargeable.

Question was — Whether she was to be considered as an inhabitant of Granby, or should be maintained by the ancient town of Symsbury including Granby.

By the COURT. The defendants did assume and promise, upon the principle that had the pauper remained in Granby she would have been an inhabitant there. Her being gone out of the place at the time of the incorporation and not having gained a settlement elsewhere, could make no difference in the reason and nature of the case.

KINSMAN, EXECUTOR OF ROBERT KINSMAN, v. KINSMAN.

**Grain growing upon land doth not pass by the description of personal estate in a will.**

ERROR, to reverse a judgment of the County Court, in an action of trespass, brought by Bethiah Kinsman against said Jeremiah for a quantity of rye.

The case was — Jeremiah owned the land where the rye grew, and in January A. D. 1782 leased it to said Robert and to his wife Bethiah, during his natural life and the natural life of said Bethiah; Robert entered, sowed the rye and died, having made his will, by which he gave his personal estate to his wife, and £25 per annum, and appointed said Jeremiah his executor; the executor entered and cut the rye; and for that, this action is brought, and a recovery had in the County Court.

Judgment — Manifest error.

The rye was the property of said Robert, and did not pass by the bequest of personal estate: not being severed from the land; the executor had right to enter and cut it, notwithstanding said Bethiah had an estate for life in the leased premises.

SESSIONS v. AINSWORTH.

**An obligation for money payable in collateral articles, may be discharged, by paying the money.**

UPON error in the case of Sessions v. Ainsworth it was determined — That an obligation for any sum of money payable in collateral articles, is dischargeable by paying or tendering the money.

CARPENTER v. CHILDS.

**Error will not lie against an interlocutory sentence or order, until final judgment is given in the cause.**

ON a writ of error, Carpenter v. Childs, it was determined — That error will not lie against a judgment of a court in arresting a verdict and ordering a repleader, until a final trial is had in the cause.

BACON v. FITCH ET AL.

**An obligation given to the heirs of a person living, by that description only, is good.**

ERROR, complaining of a judgment of the County Court in an action brought by Fitch et al. children and heirs of Mary Backus against said Bacon, on a note given by him to the heirs of Mary Backus, she then being alive, for £20, payable the 16th of January, A. D. 1766.

A demurrer was given to the declaration.

The question was — Whether the heirs of a person living, is a sufficient description for them to take by.

Judgment — Declaration sufficient: And this judgment was affirmed.

By the COURT. All that is necessary, in an obligee or grantee, is that he hath a capacity to take, and is so described as to be certainly known to be the person meant and intended; and in this case there cannot arise a doubt as to who the promisees were.

STORES v. SNOW.

ACTION of ejectment, for land mortgaged to the plaintiff.

Plea — Not guilty. Issue to the jury.

The defendant offered evidence to prove that both the note, and the mortgage given to secure it, were fraudulent, and done to avoid creditors. But by the court not admitted, for a fraudulent conveyance is good between the parties; although it is void as to creditors.

STORER v. HINKLY.

**An administrator is accountable for rents of land, where the estate is insolvent.**

**Expenses incurred in the sale of lands in Vermont, not allowable against the estate of the deceased lying in Connecticut.**

APPEAL from probate. 1st. Because the judge had allowed the executor too much in his account. 2d. Because he had allowed him £190 13s. 9d., for charges in selling lands in the state of Vermont, which sold for but £65 6s. 3d. Because he had not obliged the executor to account for the rents and profits of the real estate, before it was represented insolvent.

The court disaffirmed the decree of probate in part, viz. as to rents and profits arising upon leases given in the lifetime of the deceased; and affirmed it as to the rest. Writ of error was after brought to the Supreme Court of Errors, and the judgment was reversed as to the charges which were allowed for selling the lands in the state of Vermont.

ROOT, J., excused himself from judging in this case, having been heretofore concerned as counsel for Hinkly.

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**NEW LONDON COUNTY, MARCH TERM, A. D. 1790.**

WORTHINGTON v. DEWIT.

**Every motion in arrest must be answered directly by the court; either, that it is true or not true, or that it is sufficient or insufficient.**

ERROR, action of *indebitatus assumpsit*, for money had and received by said Worthington.

Plea — *Nonassumpsit.* Issue to jury. Verdict — That the defendant did assume, etc.

Motion in arrest — That certain writings were handed to the jury, by the counsel for the plaintiff, unknown to the court or defendant's counsel, and which had been adjudged by the court inadmissible; particularly, a stated account under the hand of the plaintiff's counsel: which writing and account said jury had in the consideration of the cause, and looked upon them as evidence, and found their verdict accordingly; and said court gave judgment, that said motion was overruled, and for the plaintiff to recover.

Error assigned — That said court ought to have arrested said verdict, and ordered a repleader.

Judgment — Manifest error; for the facts stated in said motion are sufficient if true, but by the answer the court give, it doth not appear whether they are true or not; and for this uncertainty in the answer, given by the court to the motion, the judgment is reversed.

GREEN V. DEWITT, EXECUTOR DE SON TORT OF JABEZ DEAN.

**In an action against an executor, *de son tort* — he cannot plead to the *scire facias*, that he hath never intermeddled with the estate of the deceased.**

**Taking administration after intermeddling, will not purge the wrong.**

SCIRE FACIAS, to have judgment against him in *propria persona*, dated 19th January, 1790.

Plea — That he did receive of said Jabez's wearing apparel to the amount of twenty shillings only; and that after said Green had commenced his original suit against him, he took administration on said Jabez's estate, reported it insolvent, and commissioners were appointed and a time allowed for the settlement of said estate until the 1st day of May next, which time is not yet expired.

Reply — That the defendant took possession of an estate belonging to the deceased, to the value of £700, lawful money, as executor in his own wrong; and that his taking out administration and proceeding on said estate aforesaid, is all fraudulent, etc.

Defendant rejoins — That he received only said twenty shillings' worth of apparel, belonging to the deceased.

Demurrer — Judgment that the rejoinder is insufficient, and for the plaintiff to recover.

By the COURT. The defense set up, however it might have been available in the original action, is inadmissible upon the *scire facias*. Further, the defense is insufficient if it had been regularly pleadable to the *scire facias*, for it admits the receiving of twenty shillings in his own wrong, and the plaintiff avers that he received £700 worth of estate, which is not traversed or denied by the defendant; and his after taking administration does not purge the original wrong.

TOWN OF NEW LONDON v. TOWN OF MONTVILLE.

**An action of *assumpsit* will not lie against a town where a part only are liable.**

ACTION of *assumpsit*, declaring, that in October, A. D. 1786, Montville was incorporated into a town, and taken from the towns of New London, Lyme and Colchester, and in the act of incorporation, it was enacted, that the inhabitants in said town of Montville, which belonged within the town of New London, should pay their part and proportion of all the debts incurred upon the town of New London, according to their list given in the year A. D. 1785 — That said town of Montville appointed a committee to settle and adjust said accounts with the selectmen of said New London — That upon a settlement, there was found due from the inhabitants of that part of Montville, which was taken from New London, the sum of £263 14s. 2d., according to the rule given by said act, and thereupon and in consideration thereof, the plaintiffs say that the defendants being liable, did assume and promise to pay the same, etc.

Demurrer to the declaration — Judgment that the declaration is insufficient; and by the court; it appears by the plaintiff's own showing that it was not originally the duty of the defendants to pay said debt, but of a certain part of them, viz. those only who were taken from New London, and nothing appears whereby said town of Montville have assumed this debt; their appointing a committee to settle with New London did not amount to an assumption.

EDY v. WILLIAMS.

**A man is not concluded by a judgment to which he was not party or privy.**

ACTION of ejectment for certain lands. The defendant plead in bar — That on the 10th of February, A. D. 1787, the plaintiffs, Tisdale Edy and Gilbert Edy, were sole owners of the demanded premises; and by deed of that date, conveyed it to Jonathan Boardman of Preston, and said Jonathan, on the 21st of March, A. D. 1787, by deed conveyed it to Henry Williams; and by agreement, the plaintiff was to remain in possession, one year from said sale; at the expiration of said year, the plaintiff refused to deliver up the possession, and claimed the same in virtue of a lease, given him by said Boardman, dated the 11th of February, A. D. 1787, for the term of 999 years, defeasible upon said Boardman's paying to him the sum of £533 13s. 4d., money of New York, of which the defendant was wholly ignorant; and the plaintiff leased said premises to William Chapman, who entered upon said premises, and the said Henry Williams brought his action against him for said premises; and before the Superior Court at New London, on fourth Tuesday of September, 1788, upon the plea of no wrong or disseisin, he recovered judgment for the demanded premises against said Chapman, in which trial the present plaintiff appeared and took upon him the defense of said title: which judgment was executed, and the said Henry put into possession on the 6th of October, A. D. 1788, and that the defendant is in holding the same under said Henry, as tenant to him; and thereupon he says that the title to said land hath been once heard, adjudged and determined, and ought not again to be drawn in question.

The plaintiff replied, and recites the lease, and the conditions, which are — that whereas Jonathan Boardman has this day given to said Edy two notes, one for £266 13s. 4d., money of New York, payable on the 15th of May next, in good rum at four shillings per gallon — One for £266 13s. 4d., like money, payable in good rum at four shillings per gallon, by the 15th of May, A. D. 1788; now if said Board-

man pay said notes then said lease is to be void. The plaintiff further says, that the sale and transaction between said Henry and said Boardman were fraudulent and done to cheat him out of said land; and that although it be true that said Henry did recover judgment for said land against said Chapman, as the defendant has plead, and that he did furnish said Chapman with said lease; yet said Chapman by collusion with said Henry, suffered said judgment to go against him, and immediately after took a lease of said land from said Henry, and has discharged and released to him all right of bringing any writ of error or petition for a new trial in said cause, so that if the plaintiff is barred, it is by a judgment to which he was not a party, nor of which he had the control; having never been properly cited in to vouch and defend said title, and against which he has no remedy.

Demurrer to the reply — Judgment that the plaintiff's reply is sufficient, and that the plaintiff recover.

By the Court. It appears by the pleadings that the plaintiff hath not had a day in court in which he could be heard upon the validity of his title; and to adjudge the bar sufficient, would preclude him from ever having an opportunity to be heard thereon, which the law never intended.

MOTT v. MEACH, EXECUTOR TO MOSES MEACH.

**It is no cause for arresting judgment that the jury have found a verdict upon evidence which in the opinion of the court is not sufficient.**

ACTION of *assumpsit*, upon a promise of said Moses, made in August, A. D. 1788.

Plea — That the deceased did not assume and promise.

Issue to the jury — Verdict that said deceased did assume and promise, etc.

Motion in arrest — That by the Statute against Frauds and Perjuries, and for the limitation of suits, the action is not sustainable.

Judgment — Motion insufficient. The promise is laid to have been made within three years before the bringing of the

action: besides the jury have found the promise: and it is no reason for arresting a verdict, that the jury have found it without sufficient evidence in the opinion of the court, for they are judges of the evidence. Same point adjudged at New Haven this circuit, in the case of Smith v. Bradly; Kirby's Rep. 61, Woodruff v. Whittlesey.

GATES v. BRATTLE, ADMINISTRATOR OF WILLIAM BRATTLE.

**Observations on the case, and on the Statute of Limitations.**

WRIT OF ERROR, complaining of a judgment of the County Court, in an action upon a bond, for £700, dated 5th of June, A. D. 1758, payable to William Brattle, by the 25th of December after, with interest, and executed by said Gates and one Thomas Gustin, brought by Thomas Brattle administrator of said William v. Gates; writ dated 5th November, A. D. 1785.

Plea in bar — That by a statute of this state, entitled an act for the limitation of prosecution in divers cases, etc. it is enacted that no suit, process, or action shall be brought on any bond, bill, or note, under hand, given for the payment of any sum or sums of money, not having any other condition, contract or promise therein, but within seventeen years next after an action on the same shall accrue — Provided nevertheless, that the time this state was engaged in war shall be expunged, and not computed in said time — Provided also, that persons over sea, or legally incapable to bring their actions for their debts, etc. may bring the same any time within four years after their coming from over sea, or becoming legally capable; and that said bond is for the payment of a certain sum of money, without any other condition, etc.

The plaintiff replies, that he ought not to be barred, because, he says that the defendant and said Gustin, on the 5th of June, A. D. 1761, paid to said William the whole of the interest on said bond; and on the 23d of March, A. D. 1764, said William and said Gustin reckoned, and found due on said bond the sum of £800, lawful money, and thereupon made and

subscribed the following writing on said bond, viz. March 23, 1764, due on this bond £800, William Brattle, Thomas Gustin; whereby the said Gustin and the defendant did fully recognize said bond, and the sum due thereon. The plaintiff further says, that said William, on the 10th of April, A. D. 1776 went from Boston, over sea to Halifax, and there resided until the 20th of October following, when he died; and the plaintiff further says, that there was no administration taken, or any person capable of bringing a suit on said bond, until the 9th of October, A. D. 1784, when the plaintiff took administration on said William's estate, and this suit is brought within four years from the taking administration as aforesaid.

The defendant rejoins — That said Gustin, severally and alone, without and against the consent of the defendant, subscribed said writing on said bond; that the plaintiff returned into this state in October, A. D. 1779, and might then have taken administration, but neglected to do it for more than four years after his return, and until the 9th of October, A. D. 1784. To the rejoinder of the defendant the plaintiff demurred; and judgment was for the plaintiff; that the rejoinder of the defendant was insufficient.

Error assigned — That said County Court ought to have adjudged said rejoinder sufficient.

By this Court. There is nothing erroneous in the judgment.

The reasons which seemed to prevail with the court in the decision of the cause, were those which Law and Dyer, JJ., offered for dissenting from the opinion of the court in the cause of Brattle v. Gustin, reported in Kirby; and the judgment of the Supreme Court of Errors reversing the judgment of the Superior Court in that cause.

Although I excused myself from judging in this cause, on account of my having been of counsel for Gustin in the Supreme Court of Errors; yet I would make some observations upon the law which governs this case.

This is a positive law, and is binding upon the courts and the citizens, by force of the authority that enacted it.

However the legislature might have been induced, from many and various reasons, both of policy and justice, to make the law; the law when made, is the rule which must govern the judges and the citizens. The question then is not, what the law ought to have been, or why it was made? but what it is. And statutes consist of two parts, the letter and the reason.

The title of the act is, an act for the limitation of prosecutions in divers cases, civil and criminal. The first paragraph is, that no person shall be indicted, prosecuted, etc. or compelled to answer before any court, etc. for the breach of any penal law, or for other crime, etc. for which a forfeiture becomes due to any public treasury, unless the indictment, complaint, etc. be made and exhibited within one year after the offense is committed; and every such indictment, information, etc. that is not made and exhibited within the time limited as aforesaid, shall be void and of none effect. No one can be at a loss about either the letter or spirit of this paragraph; yet if we should go to guessing about the reason which induced the legislature to make it, we might be greatly divided.

The paragraph which respects this case is, that no suit process or action shall be brought on any bond, bill, or note, etc. given for the payment of money, not having any other condition, etc. but within seventeen years next after a right of action on the same shall accrue, exclusive of the time of war; but from all and every action, suit, etc. after the time limited as aforesaid, each and every person shall be forever debarred.

Can anything be plainer than this paragraph, both as to the letter and meaning of it? And it is equally clear that this case is within the purview of the statute, viz. it is more than seventeen years, exclusive of the war, from the time a right of action accrued upon the bond and the date and impetration of the plaintiff's writ.

The only question which remains, is — Whether it is within any of the saving provisos of the statute — and let us see what they are, and to whom they are extended; to persons over sea or legally incapable to bring their actions for their debts aforementioned, such may bring them any time within four years after their coming from over sea, or becoming legally capable to bring an action; notwithstanding the limitation aforesaid.

The statute begins to compute from the time a right of action accrued upon the obligation. 1st. Let us consider what is meant by over sea, as it respects locality, and as it respects time or duration. 2d. What by legal incapacity in point of disability, and of duration or time.

As to the first — Over sea, in point of locality. If it means a person's crossing a part or arm of the sea to get to the place where he is, it means everything and nothing, just as the court please; for in that sense a man may be over sea, and be in the United States, or in his own state. If it means his being in a place which cannot be got to or from, without crossing the sea or some part of it, it has a fixed determinate meaning; and this is doubtless the true meaning.

As to the time — Does it mean his going over sea at any time during the seventeen years, and remaining there ever so short a period; or his going over sea just at the close of the seventeen years, and being there at the expiration of it. Or does it mean his being over sea, when the right of action accrued, and his continuing there until the seventeen years expire? Undoubtedly it means the latter case; for there would be no sense in saving a man's right in either of the other cases; for there he might have saved himself without the aid of the proviso; and the law never means to save a man against his own negligence and *laches*.

As to the second question — A legal incapacity, supposes the person to have the right in him, but by reason of some impediment he is prevented exercising it, as minors, *feme coverts*, lunatics, etc. an administrator hath no right in him

until letters of administration are granted to him; he cannot therefore be considered as a subject of this proviso, until he has taken administration, after that a legal or a natural incapacity might attach upon him.

As to the time — The same observations apply in this case, as in the case of a man's being over sea. There being no other savings in the statute, the statute is a clear, positive, and peremptory ademption of all remedy in such case; unless within one or the other of the above provisos. And as there are no statutes in England similar to this of our own, all reasonings from them, or from the common law of that country, are very inapplicable to the case; as also are all arguments drawn from payments and indorsements upon the bond.

## Dean v. Woodbridge.

**Where a note is payable in specific articles on demand, a special demand is necessary.**

Action on note; in which the defendant promised the plaintiff to pay him £36 2s. 6d., in West India goods, on demand; and no special demand is laid in the declaration. The defendant demurred to the declaration on that account.

Judgment — That the declaration is insufficient.

The duty of the defendant to deliver the goods arises upon a demand being made; and the breach which subjects him to damages, consists in not delivering them when demanded; and this action is not for the goods, but for damages, to compensate for the breach of the contract; which could not have happened until demand was made. Besides if this action is maintainable without a demand such an obligation would be the same as a note for money.

## Tracy v. Post.

Upon a writ of error, it was determined that an alderman has no right to sign any writs, but such as are returnable before the City Court, the mayor or an alderman.

FITCH v. LOTHROP.

The judgment of the court ought to be, where a plea in abatement is judged not to be true or insufficient, that the defendant answer over to the action.

WRIT OF ERROR. Lothrop sued Fitch before a justice, as executor of Benjamin Fitch. The defendant plead in abatement — That he is not executor of said Benjamin, nor hath administered as such, but that Joseph Isham, Esq. is administrator on the estate of said Benjamin; upon which the parties were at issue, and the judgment of the justice was, that the defendant was executor, and that the plaintiff recover nine shillings and six pence, debt and cost.

Error assigned — That the judgment ought to have been a *respondeat ouster*, and not in chief for damages; and the judgment was reversed for the cause assigned in error.

WORTHINGTON, ADMINISTRATOR OF DANIEL KELLOGG, v. HOSMER.

Where an execution has been prayed out, although after the death of the plaintiff, and delivered to an officer, and he has received the pay of the debtor and indorsed said execution; it is a good bar to a *scire facias* in favor of the administrator on said judgment.

SCIRE FACIAS to have a judgment recovered by said Daniel in his lifetime, affirmed in favor of the plaintiff; alleging that an execution had been issued, and a *non est* returned upon it; and which the defendant has never paid.

The defendant plead in bar — That after said execution was returned *non est*, an *alias* execution was taken out in said Daniel's name against her, and delivered to James Cornwell, a constable of Middletown, and she was compelled to pay said execution, and did in fact pay it to said constable; and he thereupon indorsed said execution satisfied.

The plaintiff replies — That before said *alias* was taken out the said Daniel died, and that the whole proceedings on said *alias* execution are null and void, and had by mistake. Demurrer to the reply.

Judgment — That the reply is insufficient.

By the COURT. Although it was irregular to take an *alias*

execution, after the death of said Daniel without a *scire facias;* yet the defendant has been compelled to pay said debt, to the officer who had right to receive it, and indorse said execution satisfied, which had been done. She is therefore exonerated, and the administrator must look to the officer.

PUNDERSON v. FANNING.

**An offset which is compellable only in chancery, is a good consideration, of an agreement to pay interest.**

ACTION on the case, declaring, that in January, A. D. 1786, he was indebted to Phoenix of New York, the sum of £182 for goods he purchased for the defendant's use, and for which the defendant was to pay said Phoenix; that the defendant was indebted a further sum of £155 10s., for goods purchased for himself of said Phoenix, making in the whole £337 10s.; that the defendant obtained from said Phoenix, the plaintiff's note, for £182, sued it, got judgment and execution, and committed him to gaol upon it, upon which said Phoenix levied other executions upon the plaintiff, and imprisoned him thereon; that in March, A. D. 1786, the plaintiff recovered a judgment against the defendant for the sum of £337 10s. 4d., for which he had execution, and was about to levy it on the body of the defendant, which he had no way to pay, but by the plaintiff's offsetting the £182, for which he was imprisoned, towards it; and to induce the plaintiff to make said offset, in and by a certain writing, promised and engaged as follows, viz. whereas Ebenezer Punderson was imprisoned in March last, upon an execution in favor of Phoenix, for £185, debt and cost, which it was my duty to have paid — I promise to pay him the interest of that sum annually, until he shall be released from his imprisonment on said Phoenix's other executions, which was occasioned by my debt, etc.

Plea in bar — That the defendant was taken in Norwich, upon the plaintiff's execution for £337 10s., and had no way to pay the debt, unless the plaintiff would offset said £185, for which he was imprisoned, and to induce the plaintiff to do that, and for no other cause said writing was given, and is void. Demurrer to the plea.

Judgment — That the plea is insufficient.

This action is brought on a written promise; the consideration is not an illegal one, nor an idle one; it is in consideration the plaintiff would make an offset, which the defendant had no way to enforce, but by suit in chancery.

PHILLIPS v. HALSEY.

**On a hearing in damages on a note, which is defaulted; a claim, on the ground of another agreement, by the defendant, cannot be offset on the note.**

ACTION on a note, dated for payable, etc. Case defaulted. Defendant moved to be heard in damages; alleging that it was given for the premium on a policy of insurance from New London to Ireland, with liberty to go to the Isle of May, and in case said Snow should not go to the Isle of May, 3 per cent. of the premium should be retained; and that said Snow did not go to the Isle of May.

Question was made — Whether this could be introduced on a hearing in damages on the note.

By the COURT. It cannot. It is another contract than that on which the action is brought; and if there is anything due on that ground the court are not authorized to make the offset.

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**MIDDLESEX COUNTY, JULY TERM, A. D. 1790.**

Hon. ELIPHALET DYER, Esq., *Chief Judge.*

*Judges.*

Hon. ANDREW ADAMS, Esq., Hon. CHARLES CHAUNCY, Esq.,
Hon. JESSE ROOT, Esq., Hon. ERASTUS WOLCOTT, Esq.

WARNER v. ROBINSON.

**If the jury refer the decision of a cause or the assessment of damages to chance — it is good cause of arrest.**

ACTION of the case upon a recommendation in writing of one Richard Spelman, etc. Issue to the jury — who found for the plaintiff to recover £132 6s. 8d. lawful money damages, etc.

Motion in arrest — Among other exceptions, that the jury were greatly divided in opinion with respect to the damages;

that they agreed upon the following method to assess them, viz. each to mark a sum on a piece of paper and put it into a hat, and that the twelve sums thus marked, being added together and divided by twelve, the quotient should be the sum of damages; and that the damages were thus found and assessed by the jury. This was denied by the plaintiff.

The court find the facts to be proved, by inquiry of the jurors; and arrest the verdict, upon the principle that in trials nothing is to be left to hazard or chance. The case of Henshaw v. Thompson, adjudged Hartford adjourned Superior Court, December A. D. 1777, is in point; which was an action of the case, and verdict for plaintiff for £30 10s. 8d. damages. This judgment was arrested, because the jury took the same method to ascertain the damages.

BOLES v. LYNDE.

**In a prosecution for an offense against a statute, which enacts a fine, and also, the forfeiture of the utensils by which the offense is committed: on conviction, the judgment ought to be for the utensils and not for the value.**

ERROR to reverse a judgment of the County Court in a prosecution upon the statute, entitled an act for encouraging and regulating fisheries, by which it is enacted, that no person shall set or draw any seine for the purpose of catching fish, between the 15th of March and the 15th of June in any year, south of an east and west line from Seabrook fort, within one mile and a half east and west on each side of the mouth of Connecticut river, except, etc. on pain of forfeiting and paying a fine of £10 on conviction; and also shall forfeit the seine, ropes and other utensils used in catching fish, contrary to the act. The complaint alleged that said Boles had drawn a seine within the aforesaid limits for the purpose of catching fish, etc. whereby he had forfeited £10 for the uses mentioned in said statute; and also said seine, ropes, etc. The defendant made default of appearing and the court considered and gave judgment that he pay the sum of £20 being the £10 fine and the value of the seine, etc.

Error assigned — That judgment ought to have been for the penalty of £10; and also that said seine, etc. be forfeited, to and for the uses mentioned in the statute.

Judgment — Manifest error, for the reason above assigned. The court had nothing to do in assessing the value of the seine, etc. in this prosecution — for the statute is that he forfeit the seine, etc. and not the value of the seine, etc.

ALSOP v. GOODWIN.

**Parol evidence not admissible to prove that certain expressions in a note meant what they expressed.**

ACTION upon a note, dated 4th June 1778, for £474 5s. 10d. lawful money and interest. Plea full payment. Issue to the jury.

The plaintiff offered witnesses to prove that said note was for lawful silver money.

By the court not admitted; because unnecessary, the note speaks for itself. Had the motion come from the defendant, to have shown that it was given for the common currency of the country, which was called lawful money, the case would have been otherwise.

CHAPMAN v. GRIFFIN.

**The appraisers of land taken by execution, must all be freeholders of the town in which the land lies.**

ACTION of ejectment. The plaintiff's title was the levy of an execution in A. D. 1789, duly made. The defendant sets up title under a levy made upon the same lands in A. D. 1783. All the appraisers were agreed upon by the creditor and debtor, but one of them did not belong to the town where the land lay.

Judgment was for the plaintiff; upon the ground, that the statute is express, that the land shall be appraised by freeholders of the same town; and the agreement of the parties cannot alter the law.

TOWN OF EAST HARTFORD v. MIDDLETOWN.

**An idiot who lives with and is supported by the mother, is settled with the mother.**

ERROR to reverse a judgment of the County Court, in an action on book, brought by Middletown to recover pay for supporting one Mellisant Dowd, a pauper.

The jury found a special verdict, viz. That said Mellisant was born in A. D. 1759 in Middletown, where her parents were then legally settled; that afterwards her father died, and in January A. D. 1772, her mother married to Dolbier of Hartford, east side of the river, and moved there with her daughter the said Mellisant, where she lived with her husband said Dolbier, until his death sometime in the year A. D. 1777; that her mother continued to live in said Hartford, on the east side of said river, and said Mellisant with her, until sometime in A. D. 1784, when said East Hartford was incorporated into a distinct town; that she continued to live in said East Hartford with her mother, until the 10th of November A. D. 1787, when her mother died. During the whole of said time she was supported and nurtured by her mother, she being an idiot; that upon the death of her mother she became chargeable and was sent to Middletown; and for supporting her this action is brought. Judgment of the County Court is that the law is so upon the facts aforesaid that the defendants do owe, and for the plaintiffs to recover, etc.

Error assigned generally.

Judgment — Nothing erroneous. The mother by marrying with Dolbier, became settled in Hartford in right of her husband; and after his death she became settled there in her own right — and the said Mellisant being an idiot, was settled with the parent.

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**NEW HAVEN COUNTY, JULY TERM, A. D. 1790.**

HALL v. MERRIMAN.

**The court will not adjudge a writing not to be libelous, which arbitrators have found to be such; if the case is in the least doubtful.**

ACTION on note. Plea in bar — That said note was given to oblige the defendant to abide the award of arbitrators, upon the following writing, (the writing is here recited in the plea) which writing was posted up in a public place; that said arbitrators found the defendant guilty and awarded him to pay £10; and that said arbitrators were mistaken in point of law;

for that said writing doth not amount to a libel, nor are said words actionable.

The plaintiff replied the submission and award, and performance on his part and a breach on the part of the defendant. Demurrer.

Judgment — That the reply is sufficient.

By the COURT. The writing is libelous and tends to bring disgrace upon the plaintiff; but was it even doubtful, after a hearing by arbitrators, judges of the parties' own choosing, who have judged it to be so, this court would not set aside their award.

APTHORP v. LOCKWOOD.

**A garnishee may be inquired of respecting a mistake in the note, claimed of him.**

**A plaintiff may recover of the garnishee the balance of a debt, due from him to the absconding debtor, by assignment from others.**

SCIRE FACIAS against him as garnishee to Charles M'Evers.

It was determined that he might be inquired of relative to a mistake, which intervened at the giving of the note to said M'Evers, for which he is now challenged. Also it was determined, that the plaintiff recover a debt due from Lockwood to M'Evers and Company, that was assigned to the said M'Evers, as being his property, by force of the assignment.

FOWLER v. BISHOP, COUNTY TREASURER.

**State attorneys are informing officers within the meaning of the law respecting costs on criminal prosecutions.**

ERROR to reverse a judgment of the County Court, for cost upon an information of the state's attorney, against said Fowler, on which he was acquitted.

Error assigned — That no cost ought to be taxed against the defendant in such case.

Judgment — Nothing erroneous.

By the COURT. The words of the statute are, that all persons who shall for any matter of delinquency, etc. be anywise prosecuted, by any informing officer, legally appointed and

sworn for that purpose, shall pay all the necessary cost, etc. whether on trial, they shall be found guilty or not, etc. By this statute it is that costs are taxed in any prosecution of a criminal nature; and if the plaintiff in error is to be excused from cost in this case, it must be upon a principle that would equally excuse him, if he had been found guilty; — which is, that the state's attorney is not an officer mentioned in the statute. But whatever doubt there might have been upon the words of the statute, long uniform practice has removed that doubt — and the informations of the state attorney are considered as standing upon the same ground, in this respect as those of other informing officers.

### Holebrook v. Lucas.

**A deed given by a grantor, who is disseized and out of possession except to the possessor, is void.**

Action of ejectment for a tract of land. Plea not guilty. Issue to the court.

The land belonged to Lucas's wife in fee; she died without ever having had a child; Lucas continued in the possession claiming it to be his; her brother takes administration and has the land distributed to him as her heir-at-law, and sells it to the plaintiff; Lucas being in possession claiming it at the same time.

The question was — Whether the brother's deed was void by the statute, he being disseized at the time of executing it, to the plaintiff?

By the Court. Judgment — That the defendant is not guilty, on the ground that the deed is void by the statute.

### Austin v. Nichols.

**A writ dated 20th October 1789, to be answered on the 30th of October next, is October twelve month.**

Error to reverse a judgment of a justice. Nichols sued Austin before a justice by writ dated the 20th of October A. D. 1789, and summoned him to answer on the 30th of October next; and judgment was rendered on the 30th of October A. D. 1789.

Error assigned — That the defendant was summoned to appear on the 30th October A. D. 1790.

Judgment — Manifest error; for the word next has relation to the month, which would be October twelve months from the date of the writ.

SMITH v. BELLAMY.

The facts put in issue, must be found explicitly, to be true or not.

ERROR to reverse a judgment of the City Court, in an action brought by Smith against Bellamy, in which a special issue was joined to the court; and the court gave judgment, that having heard, etc. and considered, etc. do find the issue in favor of the defendant.

Error assigned — That said City Court have not found the facts put in issue.

Judgment — Manifest error.

By the COURT. The facts put in issue by the pleadings must be found directly for or against him that affirms them.

CLARK ET AL. v. TURNER.

An information for an assault and battery and breach of the peace by a common person, without joining the public, is no more than a civil process and the same notice must be given.

ERROR to reverse a judgment of a justice. Turner complained of Clark, etc. to said justice in his own name for a breach of the peace, in assaulting and beating him; upon which a *capias* issued and the Clarks were arrested and had forthwith before the justice; where they plead a special plea — which was overruled and judgment against them, for forty shillings damage and cost.

Errors assigned — 1st. That said prosecution was illegal, the public not being joined in it. 2d. That it was only a civil suit and required six days' notice. 3d. That said Samuel Jr. was a minor and plead by an attorney.

Judgment — Manifest error, upon all three of the exceptions.

MERVIN v. POTTER.

A receipt having been given in evidence on a plea of full payment to a note and disallowed; is no objection to its going to the jury, in an action of *assumpsit* for the same money.

ACTION of *assumpsit* for £60 6s. 3d., money paid to the defendant on account of a certain note to have been indorsed thereon, and for which he gave a receipt; the defendant never indorsed it, but recovered the whole sum of the note, etc. The defendant plead *nonassumpsit*. Issue to the jury.

The defendant objected against the plaintiff's producing said receipt to the jury, or any evidence about it; because, that in the action brought by him on said note, the present plaintiff plead full payment, and under that issue he offered said receipt to the jury, and it was found and adjudged on said trial, that said receipt was for but £6 6s. 3d., which was allowed.

By the COURT. The plaintiff may prove his declaration — the receipt was only matter of evidence in the former trial, and is no more now. The point was then collaterally tried, now it will be directly decided. The receipt was admitted.

WARNER ET AL. v. TOMLINSON ET AL.

A demurrer in chancery if ruled for the plaintiff is not final — but the court must inquire and find the facts.

ERROR to reverse a decree in chancery, of the County Court. Tomlinson et al. brought their petition in chancery against Warner et al. and Warner made a special plea in bar; to which a demurrer was given, and the County Court judged said plea insufficient and thereupon, without further inquiry, or finding any facts, proceeded to pass a final decree in the cause.

Error assigned — That said decree was illegally and erroneously conceived and made.

Judgment — Manifest error; for a judgment upon a demurrer in chancery, in favor of the petition, or against the plea, is not final, but interlocutory; besides, said court have not found any facts, to warrant said decree.

**FAIRFIELD COUNTY, AUGUST TERM, A. D. 1790.**

PALMER v. PALMER.

**Civil causes cognizable before a single minister of justice, must be prosecuted before such authority in those towns only, wherein the plaintiff or defendant dwell.**

ERROR to reverse a judgment of a justice, in an action on a note. The plaintiff and defendant lived in Greenwich, and there were justices in said town, who could judge between the parties. The court was held in Greenwich, by a justice who belonged to Stamford.

Error assigned — That said justice by law had no right to go out of his own town to try said cause.

Judgment — Manifest error. The statute is, that all suits and prosecutions cognizable before an assistant or justice of the peace, shall be made and prosecuted, before such authority in those towns, only, where the plaintiff or defendant dwell, unless there be no authority which may lawfully try said cause, in either of said towns; then, etc.

M'EWEN v. WELLES, ADMINISTRATRIX OF SAMUEL WELLES.

**If the mortgagee takes possession of the mortgaged premises and forecloses the equity of redemption the debt is discharged.**

ERROR to reverse a judgment of the County Court, in an action brought by said M'Ewen against said Hannah, upon a note given by said Samuel on the 8th of November A. D. 1781, for £258 8s. 1d. on interest.

Plea in bar — That said Samuel in his lifetime, mortgaged to the plaintiff and Samuel William Johnson, Esq. certain lands to secure said note and a debt of £120 11s. 5d., due to said Johnson, which were of greater value than both of said debts; and that said Johnson and the plaintiff had taken possession of said mortgaged premises and had obtained a decree in chancery, foreclosing the equity of redemption in said lands; which lands were appraised in the inventory of said Samuel at the sum of £467 7d.; and thereupon she says, that before the date and impetration of the plaintiff's writ, she had made full payment of the note on which, etc.

Plaintiff replies — That the rents of said lands did not pay the interest of the money for which they were mortgaged as a collateral security; that the plaintiff exposed the same to sale at public vendue; and upon a fair sale the lands did not sell for so much by £120 11s. 5d. lawful money, as the amount of said debts; which sum remains unpaid and still due. To which the defendant demurred. Judgment — That the reply of the plaintiff is insufficient.

Error assigned — That said reply is sufficient; for that said lands being mortgaged only as a collateral security for said debts; they cannot be considered as payment, further than the sum they sold for in money, by being taken in the manner aforesaid.

Judgment — Nothing erroneous.

By the COURT. In this state, a mortgage given to secure a debt by bond, note or other specialty, is a real security given in aid of the personal security, which the mortgagee had before. And the mortgagee may pursue either, or both, until he obtains satisfaction. If he recovers his debt, the mortgage is released. If he choose to take the land and to make it his own absolutely, whereby the mortgagor is totally divested of his equity of redemption, the debt is thereby paid and discharged: And if it eventually proves insufficient to raise the sum due, it is the mortgagee's own fault, and at his resk.

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**LITCHFIELD COUNTY, AUGUST TERM, A. D. 1790.**

PERRY v. PERRY.

**In an appeal from the Court of Probate, respecting the distribution of real estate; if the appellant dies during the pendency of the appeal, his executor cannot enter.**

APPEAL from probate. Seth Perry died intestate — leaving a widow, and a mother and other collateral heirs, but no children; he also left real and personal estate. Eli Perry took administration, and caused the whole of said estate to be distributed to the widow and heirs exclusive of the mother said

Huldah, and she appeals. Pending the appeal, said Huldah dies, having made her will, appointed an executor and given away all her estate. The executor enters to prosecute said appeal, which relates to the real estate of said Seth Perry.

A plea in abatement was exhibited — That since the last continuance said Huldah the appellant has died and given all her estate to certain devisees and legatees; and that neither the executor nor heirs of said Huldah have right to prosecute said appeal.

Judgment — Plea in abatement sufficient; for the appeal is conversant about real estate to which the executor has no right, only in case of the insolvency of the personal estate.

### Clark v. Lewis.

**Where in consideration that an officer delivered to the defendant on his request a debtor taken by execution; the defendant promised in writing, to keep and redeliver him within the life of the execution, or pay the debt; the promise is binding.**

Error to reverse a judgment of the County Court, in an action Clark v. Lewis, declaring that on the 26th of October A. D. 1789 he was a deputy sheriff, and had in his hands to serve an execution in favor of Jonathan Burral against Ezekiel Lewis, for £12 10s. 3d. lawful money debt and cost, granted, by the County Court, dated the 22d of September A. D. 1789 and returnable in sixty days — which execution the plaintiff for want of estate had levied on the body of said Ezekiel, and was about to commit him to gaol; and the defendant applied to the plaintiff and requested that he would deliver the said Ezekiel to him to keep, and redeliver on the 20th of November then next: and the plaintiff upon the request of the defendant delivered the said Ezekiel to him as aforesaid; and the defendant thereupon and in consideration thereof, made and executed to the plaintiff a certain writing, dated October 26th A. D. 1789, wherein and whereby, the defendant promised the plaintiff to deliver to him the said Ezekiel, at the county gaol in Litchfield, on the 20th day of November then next; and on failure thereof, to pay the plaintiff the contents of said execution with interest and his fees; that the defendant did not

deliver said Ezekiel, nor hath he paid said execution, etc. To this declaration the defendant demurs specially, 1st. Because the plaintiff has set forth no judgment on which said execution issued. 2d, That there is no profert of the writing declared upon. 3d, That the breach is not well and sufficiently set forth. 4th, That the consideration of said undertaking is illegal, it being for the escape of a prisoner in execution. 5th, The thing to be performed by the defendant is directly contrary to law. Judgment in the County Court, that the declaration is insufficient.

General error assigned; and judgment — That there is manifest error in the judgment complained of.

By the COURT. The plaintiff in this case, need only to have set forth his being a legal officer, and the writ of execution which he had, the levy and the writing. The profert of the writing has long since been settled, in this court and in the Supreme Court of Errors to be unnecessary. The breach is well enough assigned. For no writ of execution may by law be made returnable in a shorter time than sixty days — that the debtor may have time to raise the money — and the officer, although he may levy the execution immediately for his own indemnity or for the security of the debt, yet he is not obliged to do it. For the creditor cannot call upon him until after the return day of the execution, if he then has the money or the body in gaol, he has done his duty. It was lawful for the plaintiff, after he had levied upon the body of said Ezekiel, to deliver him to the defendant to hold, and to return any time within the life of the execution — his doing this upon the request of the defendant, is a good consideration to bind the defendant to perform his engagement — and the thing to be performed was lawful and right, and cannot in any sense be considered as illegal. And this writing is nothing more than a conditional security for the payment of the execution.

HITCHCOCK v. TOWN OF LITCHFIELD

**Where a town grant is to soldiers who have enlisted, as well as to those who shall, it is binding on the town as to those who have, as well to those who shall enlist.**

ACTION, declaring that said town at a legal town meeting, holden on the 15th day of April A. D. 1777; made and passed the following vote or grant, viz. Voted to pay on the 1st day of January annually, out of the treasury of the town, to each noncommissioned officer and soldier, who already hath, or hereafter shall enlist, into either of the continental battalions, now raising in this state, for three years or during the war; after the rate of £12 per annum, during the time of his continuance in said service after this day, to the number of ninety-two; that being the quota of this town to raise. And that the plaintiff enlisted agreeable to said vote, for three years, and faithfully served for a number of years, and was reckoned in the quota of said town, and for the year A. D. 1779, the selectmen drew an order on the treasurer of said town for said sum, that he presented said order to him for payment, and he refused to accept or pay it; of which said selectmen were duly notified on the day of and thereupon the defendants became liable to pay, and in consideration thereof assumed, etc.

Plea in bar — That said order issued by mistake, for that the plaintiff enlisted on the 5th of April, A. D. 1777, before said vote had passed, and so it could be no inducement to him to enlist, and said order was without consideration. To this plea a demurrer was given.

Judgment of the court — Plea insufficient; and for the plaintiff to recover.

The grant, is expressly to such as had already enlisted as well as to those who should thereafter enlist — and the vote is equitable and just in itself; the public service and the plaintiff's performing it is a good and sufficient consideration.

SAMSON v. HUNT.

**A suit in chancery will not lie where there is adequate remedy at law, a decree in chancery must find the facts, which warrant it.**

ERROR to reverse a decree of the County Court in chancery; upon a petition brought by Hunt against Samson; showing that he gave his note for £30 to said Samson for a tract of land in the state of Vermont; that said Samson affirmed to him that he had a good title, when in fact he had no title to it, which he knew; whereby he is defrauded of said land, and said Hunt has put said note in suit. Praying for a remedy, etc. and that said note be declared void.

Plea in abatement — That the petitioner has adequate remedy at law. The plea was overruled, and said court proceeded and decreed said note to be void, without finding any facts to warrant the decree.

Judgment — Manifest error. On the ground that the plea in abatement was sufficient; and that no facts were found by the court, wherefore said note should be made void.

This cause was carried by error to the Supreme Court of Errors, and judgment was affirmed.

SMITH, EXECUTOR OF DANIEL GRANT, v. BARBER.

**Parol evidence may be admitted to explain a blank indorsement. Inhabitants of a town may be admitted as witnesses in certain cases, from necessity, notwithstanding their corporate interest.**

ACTION of *indebitatus assumpsit*, for money had and received, by the defendant, of divers persons after the decease of the said Daniel, on notes given to the said Daniel in his lifetime.

Plea — *Nonassumpsit*. Issue to the jury. By the will of said Daniel the inhabitants of the town of Torrington were made residuary legatees.

It was agreed that Barber had lived a long time with said Daniel, was a friend and favorite of his, and that the notes on which said money was received, had been delivered to Barber by Grant, a little before his death, with his name indorsed blank on the back of them; and still remained in that condition.

The first question made in this case was — Whether parol evidence might be admitted to explain said blank indorsements, and the intent of the parties therein?

By the COURT. The evidence is admissible; for a blank indorsement until it is filled up by the indorsee, has no certain import; it may be for one purpose or another, or for none at all; and therefore may be explained by parol testimony.

Second question was —Whether the inhabitants of the town of Torrington could be witnesses on account of their interest; for it was admitted that these moneys, if recovered, would go to said town.

The court doubted at first upon the principles of the law, but upon the ground of necessity, as the said Daniel lived and died in said Torrington, it was to be presumed, that other evidence could not be had; also upon the ground of former precedents and decisions they were admitted. Their interest being but a corporate interest, and the transaction being in said town, where other evidence might not reasonably be expected to be found.

FRISBIE v. COBURN.

No bond is required by statute, upon an appeal from a justice.

ERROR to reverse a judgment of the County Court, in dismissing an appeal from a justice, because no bond had been given upon said appeal.

Error assigned — That the statute does not require that bond should be given in such case.

Judgment — Manifest error.

By the COURT. All appeals are by statute, and the statute does not require that a bond should be given upon taking out an appeal from a justice. After this decision the general assembly altered the law, and required a bond to be given in such cases.

MERRILS v. GOODWIN.

**A man finding a tree of bees in another's land, gives no right to the tree or the bees; unless they went from his own hive.**

ERROR to reverse a judgment of a justice in an action of trespass, Goodwin v. Merrils; for cutting down a tree in the woods, that had a swarm of bees in it, and taking the honey, which the plaintiff had previously discovered.

The defendant plead in bar — That said bees were a swarm from his hive; that he had frequently lined them to near said tree; and that said bees were his property.

The plaintiff replied — That he found them wild in the woods, and had good right to take them. To which reply, a demurrer was given.

The judgment of the justice was — That the plaintiff's reply was sufficient; with thirty shillings damages.

Error assigned generally.

Judgment — Manifest error.

By the COURT. A man's finding bees in a tree standing upon another man's land, gives him no right either to the tree or the bees; and a swarm of bees going from a hive, if they can be followed and known, are not lost to the owner, but may be reclaimed.

SMITH v. LEAVENSWORTH.

**In an action for damages for not delivering specific articles, which were to be delivered on demand, a special demand is necessary.**

ACTION of the case, upon a certain receipt or writing, dated 11th September, A. D. 1786; wherein among other things, the defendant promised to return a certain Virginia land warrant, for 3,000 acres of land; or another of equal value upon demand; which the plaintiff avers he has never done, although often requested and demanded, etc.

Demurrer — And for cause of demurrer the defendant assigns, that no special request is laid in the declaration.

Judgment — That the declaration is insufficient.

By the COURT. This action is not for the warrant, but to recover damages for the breach of contract, in not delivering the warrant; which could not happen until the warrant had been demanded. Dean v. Woodbridge, determined at Norwich, last March term, is in point.

SEYMOUR v. ENSIGN.

**A declaration upon the covenants of seisin, good; although it also sets forth the covenants of warranty.**

ACTION declaring upon the covenants of seisin, and the covenants of warranty in a deed of lands.

Defendant demurs — 1st. Because they cannot be joined in the same action. 2d. That the defendant is not liable upon the covenants of warranty, to damages and cost, without an eviction of the plaintiff, and the defendants having been cited in to vouch, etc. which had not been done in this case.

Judgment — That the declaration is sufficient.

By the COURT. The action well lies upon the covenants of seisin; and if the plaintiff has not shown enough in his declaration to subject the defendant on his covenants of warranty, it is but surplusage and will not vitiate what is well laid.

BRUNSON v. BACON.

**Money recovered in an action, may not be recovered back, by an *indebitatus assumpsit*, upon an accord, etc. which might have been plead to the action.**

INDEBITATUS ASSUMPSIT will not lie to recover back money, which has been recovered in an action at law, upon the ground of an agreement or accord, which if it had been executed, might have been plead in bar of the action.

MARTIN ET UX. ET AL. v. STERLING.

**A man's granting a greater interest in lands than he hath, passes what interest he has.**

ACTION of ejectment for land lying in the town of Cornwall, of which the plaintiffs declare that they are seized in fee. The title of the plaintiffs was made out in this manner. These

lands were originally sequestered for the support of the ministry in said Cornwall. In A. D. 1753 they were leased by a committee of said Cornwall, to a Mr. Sumner, for 999 years; from whom they came by a number of deeds of bargain and sale in fee, to Joseph Ives, father of the woman in whose right this suit is brought and who claim the land as heirs to Joseph Ives aforesaid.

The defendant is in possession under no title, and plead in bar the original sequestration, the letting for 999 years, and the deeds of sale in fee; which are alleged, to work a forfeiture of said estate, etc. To this plea a demurrer was given.

Judgment — That the plea in bar is insufficient.

By the Court. A tenant forfeiting his interest by granting a greater estate than he hath in the lands, is borrowed from the feudal system; but by the law of reason and common sense, and the laws of this state, a man's deed or grant shall be good and valid, for so much as he hath right to, and void for the rest.

The defendant in his plea doth not traverse the seisin of the plaintiffs; he gives color to their title, but sets up none in himself; further he stands in the light of a total stranger: — The long possession of the plaintiffs, and of those under whom they claimed, by deeds of sale in fee, is sufficient against the naked possession of a stranger, even if their title had originated in a disseisin.

### Ambler v. Church.

**Action doth not lie against a justice for error in judgment.**

Error to reverse a judgment of the County Court, in an action brought by Church against Ambler for a misfeasance in his office of justice of the peace; declaring that he brought an action on book against Brooks and Brace before him; that the plaintiff appeared by his attorney Griffin, on the day of the court, and at the time set in the writ; and moved that said action should be called, which said justice refused to do, etc.

Plea in bar — That said writ was an attachment, and had

been served on one of the defendants only, by attaching his body and committing him to Litchfield gaol, where he was then confined; and no person appeared for the plaintiff, but Griffin, who showed no power from the plaintiff, to appear for him.

Plaintiff replied — That said Griffin had an ample power from him to appear in said cause, and that he showed it to said justice, before he moved to have said action called. Upon this fact the parties joined issue to the court; and a demurrer was given to the rest of the plea. The County Court found both issues of fact, and of law, in favor of Church, and gave judgment for £4 damages, etc.

The common error assigned.

Judgment — Manifest error.

By the Court. The justice is not liable in damages for not calling said action at the time, and rendering judgment under the circumstances. There is no pretense of partiality or corruption, and even if the justice erred in judgment it ought not to make him liable.

TOWN OF WATERTOWN v. TOWN OF WATERBURY.

**In an action upon an award, if it appears from the declaration that the arbitrators went upon a plain mistake in point of law; it will be bad upon a demurrer.**

Action of *indebitatus assumpsit* for one-half of the interest of the school money, and of the money the parsonage land sold for in the town of Waterbury from the month of May, A. D. 1780, the time when the plaintiffs were incorporated into a town, amounting to £200 lawful money. Declaring that before the month of May, A. D. 1780, the societies of Northbury and Westbury, lay within the town of Waterbury; that in May, A. D. 1780, the general assembly incorporated them into a town, by the name of Watertown: And enacted that said Watertown should pay and receive their just proportion of the present existing debts, and credits of said town of Waterbury, according to their list given in A. D. 1779. A controversy arose between said towns respecting the interest of the public moneys; which they agreed and referred to the

arbitrament of John Treadwell, Heman Swift, and Andrew Ward, Esqrs. who having taken on them the burden of an award, and heard the parties, made and published their award in the premises, as follows, viz. That there was a great lot, upon £150 propriety, laid out in Waterbury; which said town in A. D. 1690, divided between Jeremiah Peck, Jr. and the schools in said town, with all the after divisions; that in A. D. 1715, said Waterbury granted another lot of £150 propriety, to be disposed of by the town with all the after divisions, for the encouragement of the gospel ministry in said Waterbury: That in A. D. 1739-40 said town voted, that said ministry lands should be sold, and the moneys raised thereby, should be devoted to the use of the ministry; and be divided equally among the several parishes in said Waterbury, that then were, or at any time afterwards should be; that said school lands, and most of said ministry lands, were sold by said Waterbury, and the moneys loaned and the securities taken therefor, were to the use of the societies and school districts in said ancient town of Waterbury; and the interest arising thereon, had ever been divided annually to and among all the societies and school districts in said ancient town, until May, A. D. 1780; when said Watertown was incorporated. And thereupon they award, that said Waterbury pay to said Watertown, their proportion of the interest on said ministry and school moneys, from their incorporation, according to their list in A. D. 1779, which is £ and that said Waterbury in future pay annually to said Watertown in that proportion, until they shall agree to divide, etc.

The defendants demur to the declaration. Sundry exceptions were taken — among the rest this — That it appeared these moneys were the property and belonged to the several ecclesiastical societies and school districts, and not to the town of Watertown.

Judgment — That the declaration is insufficient.

By the Court. It appears that these moneys were granted and vested in the several ecclesiastical societies and school districts, long before May A. D. 1780 and that neither the town of Waterbury then, nor the town of Watertown since,

had or have any interest in them, but that they then, and ever since have belonged to the societies and school districts, to whom they were granted, and that both, the parties submitting and the arbitrators in their award went upon a manifest mistake in point of law.

FLEMING, EXECUTOR OF M'DONALD, v. SHERIFF LORD.

**The granting of a new trial vacates the former judgment.**

ACTION for the escape of one Bates. Not guilty plead. Issue to the jury — who find the following facts in a special verdict, viz.

That the plaintiff recovered judgment against said Bates in the County Court, in September A. D. 1786 for £252 11s. 9d. debt and cost and had execution for said sum, dated the 4th of October A. D. 1786; upon which said Bates was committed to gaol on the 14th of November A. D. 1786; that upon the petition of said Bates, the County Court in March A. D. 1788 granted him a new trial in said cause; that after granting said new trial, viz. on the 30th of said March, he left the gaol and went home; that upon a new trial in said cause, had in September A. D. 1788, said Fleming recovered judgment for only £90 damages; that said Fleming brought a writ of error against said judgment to the Superior Court in August A. D. 1789; upon which, both the judgment upon the petition for a new trial, and in the action upon said new trial, were reversed; and judgment rendered against said Bates for £28 damages, for the interest upon said first judgment; for which Fleming had an execution, which he levied upon the body of said Bates and committed him to gaol: That the judgment of the Superior Court, was affirmed in the Supreme Court of Errors. Also that the original action against Bates was by attachment; that his body was taken, and that he had procured and given special bail. Upon which facts the jury doubted and put the question of law to the court.

Judgment of the court upon the facts aforesaid, is — That the defendant is not guilty.

By the COURT. The question, in this case is, what the legal effect and operation of granting a new trial, is, upon the

former judgment. By the rules of law in England, an erroneous judgment when reversed, is to most purposes as though no such judgment had ever existed. By the decisions in this state, an erroneous judgment reversed, has notwithstanding, been considered, as a final judgment for the purpose of exonerating the bail; Butler v. Bissel was so determined, contrary to the English authorities. But as the granting of new trials, after a final judgment is in a manner peculiar to this country; very little light is to be derived from the English authorities upon the subject; it must therefore be decided by our own laws and practice.

It ought not to be in the power of the party in whose favor a new trial is granted, to injure and defraud the adverse party. But is the former judgment, upon the granting of a new trial made void, or only suspended? The design of granting new trials, is to see whether the former determination was right or not; if upon the new trial it is found to be right, why should it not be executed — if found to be partially wrong, let it be rectified, so far — if found to be totally wrong, then let the whole be avoided by a contrary judgment — the former judgment then would remain as a security until the new trial was had; this would avoid many of the difficulties which might arise in such cases. A new trial might be granted to a debtor without prejudice to the creditor, except the delay it might occasion; the judgment would remain and if he was imprisoned on it he must continue there until the new trial was had, or procure bonds to pay the judgment that should be finally rendered against him, or surrender himself back to prison upon the execution; in either of these cases the gaoler would be at no loss as to his duty.

But the court decided this case upon the principles of former practice — who have considered the granting of a new trial as setting aside the former judgment; and upon that ground have always rendered a new judgment upon the new trial; although the determination was precisely the same as the former; and since such a practice had obtained, and there are no decisions to the contrary, it would be catching the gaoler to vary from it.

SELEY v. SLOSSEN.

**The statute no bar to an action of *indebitatus assumpsit* against an officer, for money which he has received upon an execution.**

ERROR to reverse a judgment of the County Court in an action brought by the plaintiff against the defendant, for money had and received, etc. Plea in bar, admitting that the defendant was constable, that he had an execution of the plaintiffs to collect, that he received the money upon it in A. D. 1773, and indorsed it on said execution — and that by the Statute of Limitation in such case provided no action or suit could be brought or maintained but within two years after the right of action accrued. Demurrer to the plea. Judgment of the County Court, that the plea is sufficient.

General error assigned; and judgment — That there is manifest error.

By the COURT. The statute does not extend to an action for money had and received by an officer — but to actions founded upon a supposed tort, as a mis, mal or nonfeasance.

BROOKS v. THOMPSON.

**A debtor's money may be taken by execution.**

UPON a writ of error — it was determined that money of the debtor's may be levied upon and taken by an officer to satisfy an execution.

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**HARTFORD COUNTY, SEPTEMBER TERM, A. D. 1790.**

M'EVERS v. PITKIN, LATE SHERIFF.

**The administrator not liable for a personal tort or misfeasance of the intestate.**

ACTION for the default of one of his deputies in not executing and returning a certain writ of execution — pending the suit the defendant died — the plaintiff suggested the death upon the record and cited in his administrators, to show reason why judgment should not be rendered against them.

The administrators appeared and plead in abatement — That this action was for a tort or misfeasance of the said Wil-

liam, by one of his deputies, which was personal and died with the person of the said William, agreeable to the maxim of law, *actio personalis moritur cum persona.*

Judgment — Plea in abatement sufficient. Cowper, 371, Hamly v. Trot.

BULKLY v. LEWIS.

**Action of account lies before a justice of the peace.**

UPON a writ of error to reverse a judgment of a justice in an action of account, it was determined, that an action of account will lie before a justice. That the plaintiff must demand in his writ the defendant's reasonable account as well as his damages. And that the justice must first render judgment against the defendant, that he account, and then as he is not empowered to appoint auditors, he must adjust the account as auditors would do, and give final judgment for the balance.

CORSA AND BULL v. NICHOLS.

**Where fraud and duress is plead in avoidance of a note, a reply that said note was freely given without compulsion; adjudged good, without a traverse of the fraud and duress.**

ACTION upon a note, to which a special plea in bar was put in to avoid the note — that it was obtained by imposition and fraud and by duress by threatening to imprison the defendant in New York.

To which the plaintiffs replied — That said note was freely given by the defendant, without any compulsion, etc. but they do not traverse the fraud, nor the duress, which was specially plead; to which a special demurrer was given.

Judgment — That the replication is insufficient.

PITKIN ET AL. v. OLMSTEAD ET AL.

**The bed of a navigable river as well as the waters of the river, are common to all the citizens of the state — and where any person clears a fish-place in the bed of the river and continues to occupy it, he acquires an exclusive right to fish in that place, so long as he keeps up his occupation, in the proper seasons for fishing.**

ACTION of trespass for interrupting the plaintiffs in their fishery in Connecticut river. Plea not guilty. The jury find the following facts in a special verdict, viz.

That Connecticut river is a public navigable river, and abounds with fish, salmon and shad in the season of them. That in A. D. 1774 Stephen Roberts, Josiah Hurlbut, Timothy Forbs and William Roberts, the said Josiah and Timothy being two of the plaintiffs, with much expense and labor cleared a fish-place, opposite to the lands of Nehemiah, Moses, and Samuel Olmstead, adjoining to Connecticut river, and lying upon the north line of the land of said Elisha Pitkin, one of the plaintiffs, and extending north up said river forty-four rods. That said Olmsteads gave a lease to Gideon Spencer, John Kentfield, John Spencer, Timothy Forbs aforesaid, Joseph Forbs, Josiah Hurlbut aforesaid, Elijah Forbs, Aaron Burnham, Stephen Roberts, Benjamin Olmstead, Rhoderick Burnham, Samuel Hurlburt and James Pitkin; of said fish-place, who had formed themselves into a fish company; said Gideon Spencer, John Spencer, Timothy Forbs, Elijah Forbs, Josiah Hurlburt, Samuel Hurlburt and Aaron Burnham are the plaintiffs; with liberty to clear and draw seines on their land adjoining to said river, for the consideration of one-twentieth part of the fish, they should take: Which lease was sundry times renewed and continued down to the year 1788; that from A. D. 1774 to A. D. 1788 inclusive the said Hurlburts, etc. have cleared and occupied said fishing-place for taking of fish in the proper seasons; that in A. D. 1787 the aforesaid Spencers, Forbs, Hurlburts, Roberts and Burnham, with John Jones, Elisha Williams and James Pitkin, were owners of the seine, boat and fishing apparatus employed at said place, and of all the right of fishing in said fish-place, which had ever been gained by said Stephen Burnham, etc. who first cleared the bed of the river opposite the lands of said Olmsteads — and were forbidden by said Olmsteads to fish any more at said place, opposite to their lands; that they agreed and sold their seine, boat and all their fishing apparatus to the said Spencers, Forbs, Hurlburts, Elias Roberts and

Aaron Burnham; who applied to said Elisha Pitkin, Esq. for liberty to draw their seine upon his land adjoining to said river, south of said Olmsteads' land; which he granted, and also became one of their company; and the plaintiffs in the fall of the year A. D. 1787 cleared the bed of the river opposite said Elisha's land and also of said Olmsteads and in the spring of the year A. D. 1788, the plaintiffs constantly fished in the river opposite said Elisha's land, and also opposite the land of said Olmsteads and drew out their seine on said Elisha's land; and in the fall of the year A. D. 1788 the defendants with design to prevent the plaintiffs from fishing in the bed of said river, opposite the lands of said Olmsteads, did set a hedge about two rods north of the north end of said Elisha's land upon the land of said Olmsteads, and did extend said hedge and logs westward into the bed of said river six rods, below the common low-water mark, and ever since have continued said hedge and logs; that the same is an obstruction to taking of fish; and that the plaintiffs were thereby obstructed and prevented catching fish at said place in the year 1789, and the jury refer the question of law upon the facts aforesaid to the court, viz. Whether the defendants are guilty or not.

Judgment of the court — The law is so upon the facts aforesaid that the defendants are guilty.

By the COURT. The river being a public navigable river, it is free for all the citizens, to navigate their vessels in and to draw seines for the purpose of taking fish — that the bed of the river is the private property of no one, but remains as public as the waters that flow in it — whoever therefore by labor and expense, clears a fish-place in its bed, acquires a right to occupy and enjoy it, in preference to any other; and by a long-continued possession and occupation, in the proper seasons, the right is strengthened and confirmed; and the defendants had no right to disturb or interrupt the plaintiffs in the exercise of their right in their own proper fishing-place, so long as they did not go upon their land.

**WINDHAM COUNTY, SEPTEMBER TERM, A. D. 1790.**

CARPENTER v. CHILD ET AL.

**It is no cause of arresting judgment that the jury have found a verdict upon evidence, which, in the opinion of the court is insufficient.**

CARPENTER sued Child and others a committee of the north society in Woodstock for inserting his name in a rate-bill, and collecting the rate of him to pay the minister's salary in said society, when he belonged to a society of Christians of a different persuasion in Oxford — and had regularly obtained and lodged a certificate, etc. Plea was not guilty to the jury.

The jury found the defendants guilty, etc. The defendants moved in arrest of judgment — That the only evidence of the plaintiff's exemption, was a certificate lodged, etc., [reciting the certificate] which the defendants say was insufficient evidence to convict them. The plaintiff denied that the certificate was the only evidence of his exemption. The defendants rejoined, that it was the only evidence, etc. To which a demurrer was given.

The judgment of the County Court was — That the motion in arrest was sufficient, and ordered a *venire de novo*. Upon which the defendants were found not guilty. And now a writ of error is brought to reverse the judgment of the County Court upon the motion in arrest.

By the COURT. There is manifest error in the judgment complained of. For it is no cause of arrest that the jury found their verdict, in the opinion of the court, upon insufficient evidence; for they are the judges of evidence. This point has been settled by a number of adjudications.

HARRIS v. BAKER.

**One man cannot charge another in debt, where a particular mode of payment is agreed upon, unless there has been a failure on the part of the defendant.**

ERROR to reverse a judgment of the County Court in an action on book. Defendant plead a special agreement made at the time of hiring the plaintiff, to pay him in a particular

way, in a blacksmith's vice at one shilling per pound and in certain produce, etc. which he had been ever ready to deliever and pay. This plea was demurred to and judgment of the County Court — That the plea was sufficient.

This judgment was affirmed. For a man may not charge another in debt contrary to his agreement until the other has been guilty of a breach on his part.

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**NEW LONDON COUNTY, SEPTEMBER TERM, A. D. 1790.**

GRISWOLD v. JUDD.

**Public securities delivered upon a forged order, no bar to an action by the right owner, for the same securities.**

ACTION of trover for $1,600 in final settlement notes. Plea not guilty to the jury.

The defendant was agent for the deranged officers to receive their pay in Philadelphia of whom the plaintiff was one. The defendant received these securities for the plaintiff, sent to him to come and receive them, but for some reason he refused and neglected to send for them. Some time in the year 1785 a well-dressed man by the name of Brimly, presented the defendant an order from the plaintiff for the securities, and paid the defendant for his trouble and expense — upon which the defendant delivered to him the plaintiff's securities and took his receipt. It turns out that the order was forged and Brimly unknown, as to who he is, or where he is gone.

Verdict for the plaintiff and £56 damages, the value of the securities at the time they were converted.

BELTON v. HALSEY.

**A submission of an action to referees by rule of court, is revocable by either of the parties. And where an action is referred to arbitrators, to make return to the next court, and the court adjourns with the cause, the commission of the referees expires with the adjourned court.**

ERROR to reverse a judgment of the County Court in an action on book, Halsey v. Belton. At November court 1789 referees were agreed upon and appointed, and said cause

adjourned to February court, and from thence continued to June court A. D. 1790 without a reappointment. On the 2d of June the referees summoned the parties to attend them. Belton remonstrated against their proceeding, and declared that he revoked their power — they notwithstanding proceeded; made and returned their award to court — against which he remonstrated, and moved that the action might be called, that he might be defaulted — but said court accepted said award and gave judgment accordingly.

Errors assigned — 1st. That the power of said referees had expired and was revoked. 2d, That the court ought to have called the case and defaulted the defendant. 3d, That said award ought to have been set aside. 4th, That the defendant had no day in court.

Judgment — Manifest error; for the submission was revoked and had run out. An adjourned court is a distinct term, for many purposes, as much as a stated court; the one is constituted immediately by the law, the other mediately by the judges.

TOWN OF NORWICH v. CONGDEN.

**A person whose land is taken by a collector and sold for the payment of his taxes, is estopped to say in an action brought against him for the lands, that he had no title and that nothing passed by the sale.**

ACTION of ejectment for six acres of land. Plea not guilty. Issue to the jury.

Plaintiffs' title — A deed from a collector dated 3d of April A. D. 1788, who took and sold the land as Congden's estate for the payment of his taxes.

The defendant admits himself to be in possession, but says the plaintiffs have no title, for that he had no right to the land when it was taken by the collector.

To which it was replied, and adjudged — That the defendant has been paid for it, as much as though it was his, it having been sold as his, for satisfaction of his taxes; he is therefore estopped to say that he had nothing in the land: Besides the plaintiffs have a deed of the land, which is paramount to the naked possession of the defendant.

Verdict and judgment, for the plaintiffs.

BARKER v. LOTHROP AND COIT, EXECUTORS OF JOSEPH COIT, DECEASED.

A note for more than £20 money only, subscribed by two witnesses, is appealable if one of the witnesses is dead or become interested.

ERROR complaining of the judgment of the City Court in an action, brought by Lothrop and Daniel Coit, executors aforesaid v. Barker, upon a note given to said Joseph Coit, per writ dated 22d day of January and served the 25th of February 1790, and made returnable to the City Court to be holden in March, whereby it passed over the court in the month of February. From March the case was continued by special order, to April court; there being present only three judges, one of whom was father-in-law to one of the plaintiffs.

The defendant plead the statute against taking unlawful interest in bar of the action; and verdict and judgment passed for the plaintiffs to recover.

The defendant moved for an appeal, upon the ground that one of the subscribing witnesses to the note, had become interested by the death of the said Joseph, and so said note could not now be vouched by two witnesses, which motion was denied.

Errors assigned — 1st. That the plaintiff in the commencement of the action passed over February City Court. 2d. That the cause was discontinued in March court, the order for the continuance of it, not being made by a quorum of judges that by law might judge in the cause. And, 3d. That said City Court ought to have granted an appeal.

The judgment of the City Court was affirmed.

As to the 1st exception in error — It is obviated by the writ's not being served until the 25th of February when the time of service for February court had expired.

As to the 2d — The action was well in court, and if there was not a quorum of judges present to try it, it would have been continued of course.

As to the 3d — The court said if this was the first case of the kind that had come up, they should be of opinion that an

appeal ought to be granted; but the precedents are the other way; and upon the ground of precedents the court determined that there was nothing erroneous.

The judgment was afterwards reversed in the Supreme Court of Errors, for the following reasons, viz.

SUPREME COURT OF ERRORS, MAY TERM, A. D. 1791.

BARKER v. COIT ET AL., EXECUTORS OF JOSEPH COIT, DECEASED.

WRIT OF ERROR to reverse a judgment of the Superior Court, affirming a judgment of the City Court in Norwich, in denying an appeal in an action brought by said executors, against said Barker, on a note dated wherein said Barker promised to paid said Joseph Coit, deceased, the sum of £ lawful money and interest. Judgment of said City Court for the plaintiffs to recover.

The defendant moved for an appeal to the Superior Court; that although said note was for money only, and was witnessed by two subscribing witnesses; yet said Daniel Coit, a plaintiff was one of them, and so said note was not, nor could be vouched by two witnesses. Judgment of the Superior Court was reversed, for the following reasons.

It appears from the record, that the note on which the original action was brought, was given for money only, and for a sum exceeding £20; that at the time of executing said note, it was subscribed by Daniel Coit, and David Hubbard, who were then both competent witnesses; and at the time of trial Daniel Coit was not a competent witness, being one of the plaintiffs. By the statute for directing and regulating of civil actions, it is enacted, "that all actions wherein the matter in demand, does not exceed the value of twenty pounds lawful money, and all actions brought on bond or note given for the payment of money or bills of credit only, vouched by two witnesses, etc. shall be heard and finally determined by the County Court." And also by an act for incorporating a

part of the town of Norwich, it is enacted, "that an appeal shall be allowed to either party from the judgment and determination of said City Court, to the next Superior Court to be holden in the county of New London, in all cases in which an appeal is now, or hereafter by law shall be allowed from the County Courts." From all which the question will arise, whether the paragraph first recited requiring that a note should be vouched by two witnesses in order to bar an appeal, intends, two witnesses competent to testify at the time of executing the note, or at the time of trial on said note? That it intends the latter, is evident from the following considerations. First, the words of the statute seem to require this construction; the term witness in its strict legal sense, means one that gives evidence in a cause before a court; and the phrase vouched by witnesses, seems to import the same as testified by witnesses called into court, and in this sense, a note subscribed by two persons as and for witnesses, cannot be said to be vouched by two witnesses, until those persons are vouched, or called and do testify before the court respecting it. Secondly, the spirit of the statute requires this construction. For by barring an appeal when the note on which, etc. is given for money or bills of credit only, vouched by two witnesses, the law goes upon the ground, that justice may ordinarily be done between the parties, by a single trial, on account of some supposed advantage that might arise from the circumstance of the note's being vouched by two witnesses; but it is difficult to conceive what advantage can be derived in the trial of a cause from this circumstance, unless what results from the actual testimony of the witnesses; for the court by barely seeing the note to be signed by the names of two persons competent to testify at the time of signing, can never derive any knowledge of the facts that may be in issue, whether they relate to the authenticity of the note, or in general to the manner and circumstances of executing it. Nor can any presumption, that the law will regard, arise either for or against those facts simply from such signatures; and of course if they or either of them at the time of trial are incompetent to testify, his or their signature must be considered as if it had never been. It is

true indeed, that the persons signing as witnesses may themselves be ignorant of the facts in issue above mentioned, and therefore no advantage can be derived from their testimony before the court; still the law goes upon the idea that the persons specially called to sign their names as witnesses, will generally be better acquainted with the circumstances of those facts, than any other persons could be supposed to be; and therefore the law as a general rule very properly requires their actual testimony before the court where the facts in issue, as to the circumstances under which the note was executed, demand proof; such testimony being the highest and best evidence that the nature of the case is usually capable of.

### State v. Taylor and Warren.

**In a joint information against two, they may plead severally not guilty, and one put himself on the court, and the other on the jury for trial.**

Information for a burglary, charging them jointly with the facts: They severally plead not guilty. Taylor put himself on the country for trial, and Warren put himself on the court; the evidence being the same in both, the case was ordered to proceed as to both; the jury to be charged with one issue, and the court tried the other.

### Smith v. Huntington.

Action for a fraud in the purchase of a debt which Reuben Huntington owed him, for much less than the just value. Joshua Coit, Esq. who was attorney for the plaintiff, and had discretionary powers, and transacted the business for the plaintiff, was admitted a witness; upon objection made, a deposition drawn up by one Ambrose Spencer, agent for the plaintiff, was ruled out by the court.

### Jewet v. Worthington.

**Where a witness is discharged of his interest, and the party offering him is unable to produce it, parol evidence may be admitted to prove it.**

Action of *assumpsit* for £20. Issue to the jury. It was objected to a witness, that he was interested; to which it was

replied, that he was discharged, but it was not in the power of the party to produce the discharge, and offered parol evidence to prove it; which was admitted by the court upon objection made. Regularly the discharge ought to be produced, if in the power of the party, otherwise parol proof is admissible to prove it.

CROCKER v. FOX.

**The widow's right of dower is paramount to the right of the heirs or their creditors.**

APPEAL from an order of the Court of Probate, in assigning and setting out to said Grace, her dower in her late husband's Thomas Fosdick's estate, for the following reasons, viz. That said Thomas died in A. D. 1774, and his estate settled and distributed amongst his heirs; that her application to said court to have her dower set out, was not made until the 13th of April, A. D. 1789, long after said Thomas's estate had been distributed to his heirs, and after Samuel Fosdick one of the heirs had been divested of his part of the estate, by its being taken on execution for the payment of his debts, and after he had become a bankrupt: So that she is estopped to claim her dower, in said Samuel's part, under the circumstances of the case, by lapse of time, and the events which have taken place. 2d. That the appellant was a creditor to said Samuel, took said land by execution in satisfaction for his debt, without any allowance for the incumbrance of her thirds upon it. 3d. That the order for assigning her dower was general, that great improvements had been made upon said lands, and that in setting out her dower, they had taken one-half of his said Crocker's part, although but a third of said Samuel's share was assigned to her. 4th. That the court appointed a second set of freeholders to set out her dower; and the first set afterwards did the work, and made return of their doings which was accepted.

Judgment of the Court of Probate affirmed.

Three questions were made — 1st. Whether the widow had not lost her right by her neglect for such a length of time, and the great alterations the estate had undergone. 2d. Whether her thirds in Samuel's share might be taken indiscriminately, or must not be taken a third from each purchaser's

part. 3d. Whether the second appointment of freeholders superseded the first.

By the COURT. The widow's dower is paramount to the right of the creditors or heirs, and it is not in the power of either to defeat it. It is the duty of the heirs, etc. to have the widow's dower assigned and set out to her, within sixty days, etc. and the creditors of the heir take his share, charged with that incumbrance, if this hath not been previously done. And the widow hath right to have her dower set out without prejudice, by anything the heir or his creditors have done.

The second appointment was so made as it did not supersede the first; their doings and return was valid and good.

TILLOTSON ET AL. V. BISHOP.

**In an action against a society's committee for assessing the plaintiff for the support of the minister, etc. when by law he is exempted; it is necessary, that in his declaration he shows himself, to be within the exemptions.**

ERROR. Bishop sued Tillotson and others committee of the society of Chesterfield, for inserting his name in a certain rate-bill; declaring that he was a Baptist, and lodged a certificate of his exemption with the clerk of said Chesterfield, in March, A. D. 1786; that on the 19th of February, A. D. 1789, said society voted and laid a tax of one penny half penny on the pound, upon the list of A. D. 1788; and that the defendants inserted his name in said bill, with the sum proportioned to his list annexed; which he had been compelled to pay. Plea before the justice not guilty. Judgment that the defendants were guilty, and for the plaintiff to recover.

Error assigned — That the plaintiff's declaration is insufficient.

Judgment — Manifest error.

By the COURT. It does not appear by the declaration, but that said tax was laid for the support of schooling; or for arrears of debt incurred before March, A. D. 1786; whereas the exemption goes only to minister and meeting-house taxes incurred after the certificate, and the plaintiff ought to show himself to be within the exemption.

ROSE v. CLARK ET UX., ADMINISTRATORS OF SPICER, HER FORMER HUSBAND.

**The court will decree an offset against an administrator of an insolvent estate, although the claim has not been exhibited and allowed by the commissioners, on the ground of fraud.**

PETITION in chancery showing; that he bought a piece of land of said Spicer, in his lifetime, for £44, and gave him his note for it; at the same time it was agreed between said Spicer and him, that he should set up a small frame, for which he was to have £10, to be indorsed on said note; that the petitioner set up said building, which went into the estate of said Spicer; that said Spicer died before any indorsement was made of it upon his note; that his widow administered upon his estate, which was represented and found to be much insolvent; that she prevented his exhibiting his claim to the commissioners, by telling him she would indorse it; until their commission expired: and after her intermarriage with said Clark, they refused to indorse it, and recovered the whole note and interest, by judgment of the Superior Court.

Upon a hearing on the merits, the court found the facts as laid in the petition, and decreed that said Clark, and wife pay to the petitioner, said £10, and the interest from the time of his performing said work, upon the ground of the original agreement, and the fraud in the administrators, on refusing to discount it.

CHEESBOROUGH v. BALDWIN ET UX.

**Adjudged that the husband may not join with his wife in a prosecution for the maintenance of a bastard child, born before their intermarriage.**

**That the order for maintenance must be for a time certain, and not during the pleasure of the court.**

ERROR to reverse a judgment of the County Court, in a prosecution of Baldwin and wife v. Cheesborough, for the maintenance of a bastard child, born before her intermarriage with said Baldwin. To this complaint the defendant demurred and took the following exceptions, viz. 1st. It doth

not appear in what county the child was born. 2d. That the prosecutors, since said complaint has been in court, by the permission of the court, have made a supplement to it, by inserting in it that she accused him in the time of her travail, and had been constant in her accusation. 3d. That the husband and wife could not join in a prosecution of this nature. The child was alleged to have been born in A. D. 1786, and the complaint was dated in A. D. 1790. Judgment of the County Court was, that the complaint was sufficient, and upon examining the woman on oath they adjudged that said Cheesborough was the reputed father of said bastard; and made an order that he should stand charged with the maintenance of said child, with the mother, etc. during the pleasure of the court.

Errors assigned — 1st. That said complaint is insufficient and ought so to have been adjudged. 2d. That the order of court is illegal, being for no certain term of time.

Judgment — Manifest error; upon the last exception under the demurrer, and upon the last exception specially assigned for error.

Root, J., dissented from the opinion of the court with respect to the husband's right of joining with the wife in a prosecution for maintenance. The reason given against it is, that the husband is not bound to maintain such child. Admit this to be true; yet if he will voluntarily prosecute with his wife and recover maintenance, he will be bound to maintain it — otherwise the child must become a public charge. But the mother is obliged to maintain her child, and the husband marries her charged with that incumbrance, while a nurse child; he also married her invested with a right of action for the maintenance of her child, and why he may not join in prosecuting this right as well as any other I am unable to comprehend. It is certain a *feme covert* cannot prosecute alone.

This point was adjudged at Windham, March A. D. 1774, in the case of Mary Washborn v. Henry Lad. She recovered

against him for maintenance of a bastard child. He brought a writ of error to the Superior Court in March A. D. 1773 and reversed the judgment. The place of the child's birth was not mentioned in the complaint. She entered her original complaint as though it came by appeal; and pending the writ of error, she married one Hender. Lad plead in abatement that she was a *feme covert*, and could not enter and prosecute said suit alone and that her husband could not be joined. Judgment in March 1774 that the plea was insufficient, and that the husband might join in the suit; and on motion the place of the child's birth was inserted in the complaint and the cause was tried upon a special issue of accord and satisfaction by the jury, and verdict and judgment was for the plaintiffs to recover.

BREWSTER v. DENISON.

**In an action of ejectment by a purchaser under an administrator against an heir, he cannot object, that the debts allowed by the Court of Probate were unjust.**

ACTION of ejectment for 122 acres of land. Issue to the jury.

The plaintiff's title was a deed from the administrator of Col. Gardner, dated the 10th of June A. D. 1788, given pursuant to an order from the Court of Probate.

The defendant set up title under a deed from said Col. Gardner to his son Frederick Gardner, dated the 8th of November 1780, which the plaintiff attempted to avoid on the ground of its being fraudulent. The defendant attacked the plaintiff's deed, and offered to prove that the debts allowed against said Col. Gardner's estate were unjust and fraudulent. But,

By the COURT. Not admitted; the plaintiff is a purchaser without notice under an order from the Court of Probate. Frederick Gardner, under whom the defendant claims, is son and heir to said Col. Gardner; and if the debts allowed against said estate, were unjust he ought to have taken his remedy by an appeal to the Superior Court.

ISHAM v. TOWNSEND.

**In an action of ejectment upon the general issue, the plaintiff may not prevent the defendant from giving in evidence his title, by showing that those under whom he claims have failed of recovering in an action between other parties.**

ACTION of ejectment for a certain lot of land and buildings. Issue to the jury.

The plaintiff derived his title regularly down from Dr. Oliver Bulkly under a deed from him to his sons Noah and Chancy, dated in A. D. 1767.

The defendant sets up title under the heirs of Col. John Bulkly, by force of a deed given by said Oliver to said John in A. D. 1753.

To which the plaintiff objected; that said heirs brought their action for said premises against John Watrous, Esq. who was in possession; and in a trial upon the general issue to the jury, verdict and judgment was for said Watrous, and so the title of said heirs had been legally tried and decided.

By the COURT. The defendant is not concluded from giving his title in evidence — as it does not appear to the court upon what ground the heirs failed of recovering in said action.

NORWICH v. WINDHAM.

**A person's settlement in a town may be suspended, but not lost until another is gained in some other town.**

ACTION for sending one Mary Laughton, a pauper, who had one child and was pregnant with another, to the town of Norwich; whereby said town was put to much cost, etc. in their support, etc. Special issue to the court.

The facts were — Said Mary, before her intermarriage with said Laughton, was Mary Spicer, a legal inhabitant of the town of Norwich; that in A. D. 1785 she married said Laughton, an Irish foreigner, and moved with him to Windham, and there resided until January A. D. 1789 and had said child born in Windham, and was likely to have another, and said Laughton went off and left her, not having gained a settlement in any town in this state or country. The said Mary and child being destitute and in want of support, were removed by said Windham to the town of Norwich.

The court found the issue in favor of the defendants, and gave judgment — That the defendants recover their cost.

By the COURT. Said Mary was legally settled in said town of Norwich before her intermarriage with said Laughton a foreigner, who had no settlement in this country; her settlement thereby was suspended, but not lost; upon his going off or dying her right of settlement was revived; for a person doth not lose a settlement until another is gained in some other place.

ROGERS v. TRACY.

An action of *indebitatus assumpsit* for the rents and profits of land, is not within the Statute of Frauds and Perjuries.

INDEBITATUS ASSUMPSIT for the rents and profits of five acres of land from March A. D. 1788 to March 1789, worth £30. Plea in bar — The Statute to Prevent Frauds and Perjuries.

Judgment — Plea insufficient. The consideration is an actual reception of the profits, upon which the law implies *ex aequo et bono*, an obligation to pay and the rents and profits are not any interest in lands. Besides, it is an agreement executed on the part of the plaintiff; and so not within the statute. Brown and wife v. Clark. The wife when sole, sold her land to Clark for £14; gave a deed and took no security for the pay, but his parol promise, which he afterwards refused to perform. An action of *assumpsit* was brought for the money, and a recovery had, which was affirmed by the judgment of the adjourned Superior Court in A. D. 1777 upon a writ of error, upon the principle that the agreement was executed on one part, which took it out of the statute. 1 Bac. Abridg. title Agreement; Gilb. Court of Chancery.

DODGE v. DODGE AND LATHUM ET AL.

Where the consideration of a devise in a will is the maintenance of the widow, it is a lien upon the land.

PETITION in chancery; showing that in A. D. 1782 her husband Dodge made his will and died without children — by which he gave her a certain proportion of his personal

estate, and gave his real estate to his nephew Joseph Dodge — which will is as follows, viz. "I give to my nephew Joseph Dodge my island farm, my house and lot at the point, and my wood lot; and in consequence of the bequeathments to him said Joseph, he shall honorably maintain and support my widow Hannah Dodge, whom I shall leave, during her natural life, with everything comfortable, as meat, drink," etc. etc. and appointed him his executor; that said executor informed her that the will had made ample provision for her support, and thereby obtained her consent to its approbation. Further, she states that the debts swallowed up near half of the personal estate; and that said Joseph had sold said island farm to said Lathum, and the house and lot at the point to said Brown, which are worth £25 per annum; that said Joseph is removed out of the state and she is left destitute and in want, and prays for a remedy, etc.

Plea in abatement — That the petitioner has an adequate remedy at law.

Judgment — Plea insufficient. By the will the maintenance and support of the petitioner is a charge upon the estate, into whosoever hands it comes; and the statute of the state would have subjected it to her maintenance during her widowhood, had no provision been made in her husband's will: And she may enter upon the estate and hold it against the devisee, until her support is furnished; for it is the condition upon which he takes and holds the estate, it being a charge upon the land, which runs with it.

### Fobs v. Brewster et al.

**A note assigned is not liable to the creditors of the assignor.**

Scire Facias against them as debtors to one Tracy, an absconding debtor.

Plea in bar — That they owed said Tracy by note only, and that said note long before any copy of the original suit was left with them was for a valuable consideration assigned to Grosvenor. Demurrer.

Judgment — Plea sufficient. See St. John v. Simeon Smith and Redfield v. Hilhouse.

SMITH v. SMITH.

**A receipt in full of all demands respecting a certain bond, conditioned to pay a certain sum annually discharges all sums due on the bond, but not the bond itself.**

ACTION on bond for £100, dated March A. D. 1776; executed by said Noah and Jonathan Smith.

Plea in bar sets forth the condition, which is — That if the said Jonathan shall pay and deliver to her, certain articles enumerated in the condition of said bond, annually, during her widowhood, then said bond should be void, etc. that after giving said bond said Jonathan paid her £50, and on the 26th day of January A. D. 1779, said Jonathan paid her £30, and in consideration thereof she made and executed to him a certain writing or discharge as follows viz. Received £30 in full satisfaction of all demands on said Jonathan, from the beginning of the world to this day, respecting all bonds, debts or demands; whereby he was wholly discharged from the bond on which, etc.

The plaintiff traversed the defendant's plea. Issue to the court.

The question was respecting the legal construction of the discharge. The court find the issue for the plaintiff. And,

By the COURT. The discharge extends to all demands upon the bond, then due and owing — but not to the bond itself, nor to any breach which has happened since the giving of said discharge.

APLIN v. ROBERTSON, ADMINISTRATOR OF PATRICK ROBERTSON.

**An action of *indebitatus assumpsit* will not lie against an administrator for a debt due from the intestate.**

ACTION of *assumpsit*, declaring that the defendant is administrator to Patrick Robertson, and that said Patrick at his death was indebted to the plaintiff the sum of £43 12s. 10d., which was exhibited and allowed at the Court of Probate, and lands sold, pursuant to orders from said Court of Probate for

the payment of said debt, and the money received by the defendant as administrator aforesaid, for the purpose of paying said debt, and that thereupon he became liable, and in consideration thereof assumed and promised, etc.

Plea — *Nonassumpsit.* Issue to the court.

Judgment — That the defendant did not assume and promise. There was no dispute in this case about any of the facts — the whole question was respecting the operation of law upon the facts. In suits brought against administrators, etc. in right of the deceased, the first point to be decided is, Did the deceased owe? Is the demand just as to him? This being decided in favor of the plaintiff, it does not follow, that the administrator, etc. is or ought to be liable to pay it out of his own estate. This is a very different question from the first, and every administrator, etc. ought to have an opportunity to be heard upon both, distinctly and without embarrassment, according to the settled established forms of proceeding in such cases; which cannot be altered for the better.

### Brown v. Wheeler.

**A deed executed as collector of his own land, will pass the property to a *bona fide* purchaser; although sold as another's.**

Action of ejectment. Issue to the court. The plaintiff's title was a deed from Joshua Brown, a collector of taxes, who sold this land as the land of Josiah Grant Hewit, for the payment of said Hewit's taxes, and signed the deed as collector. It appears that the land was not said Grant Hewit's land, but was the land of said Joshua Brown, the collector.

The only question was — Whether said deed passed the title to the plaintiff.

Judgment — For the plaintiff to recover. The deed conveyed all the right said Joshua Brown had in virtue of his power or interest; and he cannot claim the land against his own deed from a *bona fide* purchaser for a valuable consideration.

MIDDLESEX COUNTY, JANUARY TERM, A. D. 1791.

BINGHAM v. TULLY.

Where a person receives money by authority from another and pays it over accordingly, the person for whom it is received, is liable for any misapplication.

ERROR to reverse a judgment of the County Court in an action of *assumpsit*, Tully v. Bingham; declaring that on the 2d of August, A. D. 1784 he paid to the defendant £5 lawful money on account of an execution in the hands of Sheriff Whitmore, in favor of the treasurer of the state against him; and in consideration thereof he executed the following receipt, viz. Received, Lyme August 2d, 1784, of Elias Tully, £5 lawful money, which is to be indorsed on an execution in favor of Treasurer Lawrence, in Sheriff Whitmore's hands to collect, as by the sheriff's letter to me, E. Bingham. And that the defendant, in and by virtue of said receipt, promised the plaintiff to indorse said sum of £5 on said execution, in a reasonable time; which he has never done, etc.

The defendant admits his receiving said money and giving said receipt, but says the plaintiff ought to be barred; for that he had good authority from said sheriff to do it, and that soon after, viz. on the 25th of said August, he paid the money over to said Whitmore, upon said execution against the plaintiff, on which was then due about £20; and said sheriff received said money and gave his receipt for it, which he has always stood ready to deliver to the plaintiff.

The plaintiff prayed oyer of said receipt, and recites it in his reply, which is as follows, viz. "Received of A. Stevens £5, Elias Tully £5, of P. Riley £8, amounting in all to £18, all by the hand of E. Bingham, except eighteen shillings deducted for his fees, Norwich, August 25, A. D. 1784; P. Whitmore sheriff." And the plaintiff says that he has paid the whole of said execution and fees to Treasurer Lawrence, exclusive of said £5; and that said sheriff had no other demand upon him except said execution; which said sheriff returned *non est* with his fees indorsed upon it; without that that said Sheriff Whitmore received said sum of the defendant which he received of the plaintiff, all in manner and form etc.

To which reply the defendant demurred — And judgment of the County Court was, that the plaintiff's reply was sufficient.

Error assigned — That the County Court ought to have adjudged said reply insufficient. The judgment of the County Court was reversed.

By the COURT. By the pleadings it appears that Bingham had authority from Sheriff Whitmore to receive the money from the plaintiff, and to give the receipt he did; that he paid the money over to said sheriff, on account of said execution, took his receipt for the benefit of the plaintiff, and ever held it ready for him; which was all that the defendant could do. If the money has not been indorsed or applied to the plaintiff's benefit, Sheriff Whitmore, and not the defendant, is liable.

### GATES v. JONES.

**Although an arbitration note is for more than £20 yet if neither the matters submitted or the award exceed £20 the cause is not appealable.**

ACTION on a note for £50 vouched by two witnesses: By the pleadings it appeared that this was an arbitration note; that the award was for £18.

Judgment in the County Court was for the defendant, and the plaintiff appealed; and now the defendant pleads in abatement of the appeal. 1st. That the note is for money only, vouched by two witnesses. 2d. That neither the original matter submitted to arbitration, nor the award amounted to £20.

Judgment — That the plea is sufficient upon the last exception; because that the award and the matters of controversy concluded by it, constitute the value of the matters in dispute, in this action. See Steavens v. Bass, Fairfield, August term, 1789.

### FULLER v. HANCOCK.

**The time the United States were engaged in war with Great Britain is to be computed from the 19th of April 1775, to the 3d of April A. D. 1783.**

**Indorsements on a bond do not save it from the Statute of Limitation.**

ERROR to reverse a judgment of the County Court, in an action of debt, Hancock v. Fuller; declaring on a bond given

to Thomas Hancock, dated the 29th of January, A. D. 1761, conditioned to pay £282 19s. 7d. lawful money, by the 1st of June then next, with lawful interest; writ dated 18th of October A. D. 1786.

Plea in bar — The Statute of Limitation; and that the cause of action accrued more than seventeen years before the date and impetration of the plaintiff's writ, exclusive of the time this state was engaged in war with Great Britain.

Plaintiff replies — That he ought not to be barred; because he says, that on the 30th of November A. D. 1782, certain provisional articles for the eventual restoration of peace, were agreed upon at Paris, by the commissioners of the belligerent powers to be inserted in and to constitute the treaty, between the crown of Great Britain and these United States; but not to be concluded until a treaty of peace should be entered into between Great Britain and France. And the preliminary articles of a treaty of peace between Great Britain and France, were signed on the 20th of January A. D. 1783; and the ratification of said articles were exchanged on the 3d of February A. D. 1783; and on the 20th of February A. D. 1783, a declaration of the suspension of hostilities, was agreed upon at Paris, between Great Britain and the United States, and published; and on the 3d of February A. D. 1783, it was agreed between Great Britain, France, Spain, and Holland, that hostilities should cease, and a restoration of all captures made in the channel after twelve days, and of all made after one month, from the channel and north seas as far as the Canary islands, inclusively, whether in the ocean or Mediterranean; and from the Canaries as far as the equator, after two months; and lastly, after five months, in all other parts of the world without further description of time and place: And on the 14th of February his Britannic Majesty issued a proclamation enjoining upon his subjects a strict observance of said articles; and on the 11th of April, A. D. 1783, a proclamation was issued from the congress of the United States, reciting said articles of agreement, and enjoining upon all the citizens a

strict observance of them, and a cessation of hostilities took place agreeable to said articles, and was never after recommenced; and the definitive treaty of peace between Great Britain and these United States, was not finally agreed upon and concluded by their respective ministers plenipotentiary, until on the 23d day of September A. D. 1783, when the same was done; and said definitive treaty was not ratified by the United States in congress assembled, until on the 14th of January A. D. 1784; by which, a final end was put to all hostilities; prisoners taken in war to be released, armies to be disbanded, garrisons to be withdrawn, property and papers taken, etc. to be delivered up. And the provisional articles were not to be carried into full effect, until the final ratification of the definitive treaty; and that the war was not terminated until the definitive treaty was agreed upon, concluded and ratified as aforesaid. And the plaintiff further says that the defendant made sundry payments on said bond, viz. in January A. D. 1762, £42, which is indorsed; in July, A. D. 1765, £5; in December 1767, £20; in December A. D. 1768, £19; in November A. D. 1772, £66; in November A. D. 1773, £30; all indorsed on said bond; and in December A. D. 1784, the plaintiff demanded of the defendant payment of the remainder of said bond; and the defendant, by letter under his hand, promised the plaintiff to pay him the balance due on said bond the spring following, but never has.

Defendant rejoins — That the only material difference between the provisional articles, and the definitive treaty, consists in the introductory clauses; and traverses his acknowledging said debt in December A. D. 1784, and his promising by letter to pay it. Plaintiff demurred; and County Court gave judgment, that the rejoinder of the defendant was insufficient; and for the plaintiff to recover.

Errors assigned — That a right of action accrued on said bond, the 2d of June, A. D. 1761; that the time this state was engaged in war was from the 19th of April, A. D. 1775, to the 3d of April, A. D. 1783, only; and that more than seventeen years had elapsed from said 2d of June, when the right

of action accrued, and the date and impetration of the plaintiff's writ, after expunging the time of the war.

Judgment — Manifest error.

By the COURT. The time which the state was engaged in the war, is to be computed from the 19th of April, A. D. 1775, to the 3d of April, A. D. 1783, when the armistice took place in America, and was never after interrupted; and that indorsements upon a bond doth not save it out of the Statute of Limitation.

BEACH v. CAMP.

**Where it appears in a levy upon land, that the debtor chose an appraiser, the title is good although it doth not appear, in the officer's return, that he made a previous demand of money, etc.**

ACTION of ejectment. Plea no wrong, etc. Issue to the court.

Plaintiff's title, the levy of an execution. The officer's return was, August 7th A. D. 1790, by direction of the creditor's attorney, I levied upon certain lands of the debtor bounded as follows, etc. viz. describes the land, and the creditor chose one man to be an appraiser and the debtor chose one man to be an appraiser and the creditor and debtor agreed upon for the third appraiser, all indifferent freeholders of the town of who being duly sworn, appraised said land as the law directs, at £ lawful money.

The defendant excepted against the title of the plaintiff, because it did not appear by the officer's return, that he had made demand of money, etc. previous to his levying on the land; which the law made requisite, and without which no title could be created..

Judgment — For the plaintiff to recover.

By the COURT. The statute makes it the duty of the officer, to repair to the debtor's usual place of abode, and to make demand of money, etc. to satisfy an execution, where it can be done, previous to his levying upon land; and the officer might be liable to the debtor, in such case, for not doing his duty; but it might be attended with ill consequences, as to creditors

and purchasers under executions, if the levy under such circumstances should be void; but in this case, the debtor's being notified of the levy and choosing one appraiser and agreeing to a third, without any objection, induces a strong presumption, that the officer had made proper demand; or that the debtor at that time agreed to waive it, and that the land should be taken.

Same point was determined by court and jury in an action Gold, etc. v. Carrington, at Hartford adjourned Superior Court, A. D. 1773; the officer's return was, that by direction of the creditor he levied the execution on land, and the debtor chose one of the appraisers, etc. and no return was made of any demand of personal estate on the execution; and notwithstanding this exception was taken to the plaintiff's title, the plaintiff recovered the land.

STARR, ADMINISTRATOR DE BONIS NON OF CATHARINE WHITEHEAD, v. HENSHAW, ADMINISTRATOR OF WALKER, DECEASED.

**Interest allowed on a *scire facias* against an administrator on the ground of a special agreement.**

SCIRE FACIAS, showing that said Catharine, in July A. D. 1787, recovered judgment before the Superior Court against said Henshaw, for the sum of £140 6s. 6d. lawful money, and had execution in due form of law; that on the 17th of July A. D. 1788 said Henshaw made and subscribed on the back of said execution, his promise and engagement in consideration of forbearance, and of two resolves of assembly, to pay the lawful interest, from the 2d of November A. D. 1787, until said execution should be paid; and also agreed that the interest should be collected of him at the same time and manner as the principal debt. Praying for judgment for the sums in said execution and also for the interest from said 2d of November A. D. 1787.

The defendant demurred to this declaration; and assigned for cause that said declaration was double, containing two distinct matters — but did not point out wherein the duplicity consisted.

Judgment — That the declaration is sufficient, and for plaintiff to recover the principal and the interest.

By the COURT. Duplicity must be specially pointed out by the demurrer, or it will not hold. But here is no duplicity. It is not double nor inconsistent, to ask for the interest upon the judgment, or to enforce the reasonableness of having it by any agreement of the party or acts of assembly, or other reasonable cause. As the claim of interest was grounded upon the agreement of the defendant, indorsed upon the execution in manner aforesaid, and upon an act of assembly, which is a matter of record, the court had no difficulty in giving judgment for the interest with the principal.

BAILY v. SMITH.

**Where new matter is plead, or where the traverse goes to only a part of the facts alleged, the plea must conclude with a verification.**

ACTION of ejectment for five rods of land and a house. To which a special plea in bar was given.

The plaintiff replied and affirmed new matter inconsistent with the title set up by the defendant, and traversed a part of the facts set forth by the defendant to make out his title, and concluded with a verification.

The defendant demurred specially; and for cause assigned, that the plaintiff ought to have concluded to the country.

Judgment — The replication sufficient. Where no new matter is required, and the traverse goes to all the facts alleged in the plea; it is regular and well to conclude to the country. For in that case a perfect issue is formed. But where new matter is replied, or the traverse does not go to all the facts in the plea; the reply ought to conclude with a verification, to give the other party an opportunity to answer the new matter, or to demur for want of a sufficient traverse. Cowper, 575, Sayre, etc. v. Minns; 2 Burr. 772, Cornwallis v. Savery; 3 id. 1725.

NEW HAVEN COUNTY, JANUARY TERM, A. D. 1791.

ROSE ET AL. V. HAYS.

Tenant by the curtesy liable for waste.

ACTION of waste by the heirs-at-law against tenant by the curtesy. General issue to the jury.

Verdict for the plaintiffs and £30 damages.

The law question made in this case was — Whether a tenant by the curtesy was liable for waste.

By the COURT. He is, and upon the same principle, in point of reason and justice as tenant in dower.

EDWARDS, ADMINISTRATOR OF JOHN LOTHROP, V. ADMINISTRATOR OF BOTSFORD.

A creditor who hath a claim against an insolvent estate, may appeal from the acceptance of the commissioners' return for any irregularity in their appointment or return.

APPEAL from probate for accepting a report of commissioners upon the estate of Botsford, who went to the enemy. Stating that said report was not made and returned until two years after the expiration of their commission.

Plea in abatement — That said Lothrop had not any claim allowed by said commissioners against said Botsford's estate, nor did he exhibit any to them for allowance; although he exhibited a claim to a former set of commissioners and had it allowed; yet the report of those commissioners was set aside; and so said Lothrop was not a creditor that hath right to an appeal. Demurrer.

Judgment — Plea insufficient. Although a creditor may not appeal because his claim has not been allowed by the commissioners — but if he has an existing claim, he may appeal for any other irregularity in the proceedings of the court or of the commissioners. But one appeal fairly taken and pursued must be conclusive upon all others, as to that point.

BEACH V. ROYCE.

A mortgagor remaining in possession, is to be considered as holding under and not against the mortgagee — especially where the mortgagee has a bond for the debt and interest.

ACTION of ejectment for certain lands. Plea no wrong, etc. Issue to the court.

The title of the plaintiff was a deed from the defendant of the demanded premises, dated the day of A. D. 1765.

The defendant produced a bond from the plaintiff of the same date, with a condition thereto annexed, that upon the defendant's paying to the plaintiff a certain note for the sum of £480 lawful money, with the interest, within three years from the date; he would reconvey said lands to the defendant; and that he had ever remained in possession of said lands, taking the whole profits to himself without account, and relied upon his long possession to bar the plaintiff of recovering.

Judgment — That the defendant has done wrong, etc. and for the plaintiff to recover.

By the COURT. There having been no actual ouster of the plaintiff by the entry of the defendant, and the defendants remaining in possession and taking the profits under the circumstances of this case, is to be considered as holding not against, but under the plaintiff, as tenant at will; especially as the defendant by his note had secured the annual interest of the debt, which is in lieu of the annual rents, for which he is now liable. Besides, by his accepting said bond and condition from the plaintiff he is estopped from claiming said land without paying said note.

JOHNSON v. STANLEY, THREE SELECTMEN AND TWO JOHNSONS.

Selectmen who appoint an overseer, over a man in an illegal and oppressive manner are to respond in damages to the party injured.

ACTION for wrongfully and illegally appointing an overseer over the plaintiff, without any just or legal cause, on purpose to injure him, etc. Plea severally not guilty. Issue to the court.

Upon the evidence it appeared — That the plaintiff was capable of managing his affairs, and was industrious; that he had got into an unhappy dispute with some of the defendants; from whence arose a number of law suits, in some of which he was plaintiff, in some he was defendant: That the

selectmen were too much influenced by the parties who were against the plaintiff, to take this step; from which in about three weeks they released him.

The law is — That the selectmen shall inspect, etc. and if they find any of their inhabitants reduced or likely to be reduced to want, by idleness, mismanagement or bad husbandry they may appoint an overseer, etc.

This is an authority to the selectmen, to be exercised in certain cases, against the general rights and liberties of the citizens, it must therefore, be cautiously and strictly pursued. The appointment in this case is, that upon complaint made, that Hezekiah Johnson is likely to be reduced, by law suits and mismanagement; we do appoint Isaac Hall his overseer, etc.— not that upon inspection we find, etc. nor, that upon his being cited before a justice, it is found, etc. So that the writing states no legal grounds for the measure, and none being proved upon the trial to have existed, the court was of opinion that the defendants were guilty, except Esq. Stanley, who was found not guilty; and £15 damages.

Adams and Wolcott, JJ., were for excusing the selectmen, upon the ground that they acted in a judicial capacity; but the court could not see reason sufficient to excuse them on that ground.

Hillhouse, Edwards et al. v. Mix.

**Tenants in common may join in an action for their common estate, or may each sue separately, for his part.**

**That the plaintiff shall recover according to the right he proves.**

Action of ejectment for a house in New Haven, of which they were seized as tenants in common. Plea — that the defendant has done no wrong or disseisin, etc. Issue to the court.

The case was — The plaintiffs were tenants in common of the house, and since issue joined, John Lothrop, one of the plaintiffs had conveyed his right to a third person, who had conveyed it to the defendant's wife, and is since dead. The shares of two other plaintiffs have also been conveyed to the defendant since the commencing of this action, and they have been nonsuited.

This case was argued last circuit, and continued to this term to advise. Several points were made — 1st. That tenants in common, cannot join in an action of ejectment, but each must bring an action for his share. 2d. That if they may and ought to join, the nonsuit of a part of the plaintiffs is a nonsuit of all; for there is no summon and severance amongst tenants in common. 3d. That a release from some of the plaintiffs of their rights to the defendant must be a bar to all. 4th. That the defendant being a tenant in common, cannot be found guilty, without proof of some actual force towards the plaintiffs. And, 5th. That the plaintiffs must recover according to the demand, which is of the whole house, whereas the defendant owns three shares, they therefore cannot recover in this action. The court was of opinion that the defendant was guilty, and that the plaintiffs recover according to the interest they have.

By the COURT. Former decisions are according to the British law, that tenants in common might not join; but the law has been since settled in this state, that they may join. Summon and severance is applicable in Great Britain to joint tenants, etc. but not to tenants in common, who cannot join, there being no occasion for it; but in this state, where they may all or any part of them join, a nonsuit as to some of the plaintiffs, has the effect of a summon and severance, and the rest of the plaintiffs may proceed for their shares, the nonsuit notwithstanding: The defendant's acquiring a part of the premises pending the suit, can have no operation in purging the original wrong he has done as to the other parts. Nothing is more common than for a plaintiff to recover in ejectment, less than he demands. If tenants in common demand an entirety and prove a right to a moiety, they will recover according to the right which they prove; and the judgment will be to put them into possession, without putting out him who is rightfully in, in virtue of his interest.

The defendant in this case had disseized the plaintiffs before he had any right in the house and before the action was commenced; his acquiring a right afterwards only gave him a right to remain in possession with the plaintiffs.

BROOM ET AL. v. HENMAN.

**Interest not recoverable on an unliquidated book-debt.**

ACTION of debt by book. Issue to the jury. The plaintiffs claimed interest on said debt after it became due, upon the ground that it was the general custom of merchants in New York, and had been their practice ever to charge and receive it; but by court and jury it was disallowed.

FITCH, SHERIFF v. JONES ET AL.

**On a bond to indemnify the sheriff against the default of a deputy, forty shillings allowed for every suit against the sheriff on his account, besides the cost.**

ACTION on bond; conditioned to save the plaintiff harmless on account of his appointing James Reynolds his deputy; upon a hearing in damages the court allowed the plaintiff all his reasonable cost and forty shillings for each action, which had been brought against him for said Reynolds's default.

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**FAIRFIELD COUNTY, JANUARY TERM, A. D. 1791.**

LAWRENCE v. KNAP AND MENZEY.

**The interest in a mortgage, accompanies the interest in the debt, for which it is a collateral security.**

PETITION in chancery; showing that Lownsbury was indebted to Plat, for which he gave his note and a mortgage as collateral security; which deed was recorded. Plat was indebted to Hunter, and for a valuable consideration assigned said note to him at the same time delivered him said mortgage deed. Hunter assigned said note to the petitioner for a debt which he owed him and also delivered to him said mortgage.

The petitionees attached the mortgaged lands and had them set off to them on executions, as Plat's estate, in satisfaction of debts due from Plat to them. The petitioner had recovered judgment in ejectment for said lands in Plat's name and had

taken possession, and now prays that the petitionees may be compelled to release to him their right and title to said premises, or that he be in some way quieted in his right to said lands.

This cause was twice argued. The court now granted the petition and passed a decree against Menzey; Knap having deceased pending the suit, for him to release all his right to said mortgaged premises; upon the principle that the petitioner owned the debt for which said mortgage was given as collateral security — that he who is entitled to the debt, which is the principal thing, hath right to all the collateral securities, given to insure the payment of the debt; especially as in this case, where the actual delivery of the mortgage accompanied the assignment of the note, of which the petitionees had notice. Powel on Mor. 50, 298, 303; 2 Burr. 979.

Afterwards a petition was brought against the heirs of Knap and a similar decree passed against them — notwithstanding they had purchased the equity of redemption of Lownsbury, which might entitle them to redeem, but was no bar to the petition.

STATE v. BENNET.

**A person, notwithstanding he will be entitled to a premium upon conviction, may be a witness, unless there are other circumstances, which exclude him.**

INFORMATION for passing a counterfeit guinea. Not guilty to the jury.

One Collins was offered as a witness and objected to for the following reasons: Bennet was a minor — had obtained said guinea in a simple manner and made no secret of its being a counterfeit; that the witness had made various attempts to get said guinea, on purpose as he declared, to have Bennet convicted in order to entitle himself to the premium of £10; that he finally succeeded, by giving Bennet $2 for it; that he immediately went and informed against Bennet, and offered himself as a witness to convict him.

By the COURT. A witness being entitled to the premium is a consequential matter, and from the necessity of the case will

not exclude him, although it lessens the weight of his testimony; but where a witness has acted so villainous a part as Collins by traducing a young lad into a crime, in order to betray him, from the sordid motive of obtaining the premium, discovers such depravity of heart, as would render it dangerous for a court of justice, to admit him to testify — he was therefore rejected.

SHERMAN ET AL. v. NICHOLS.

**Daughters' husbands are not liable for the support of their wives' parents.**

ERROR to reverse a judgment of the County Court on a petition brought by said Nichols against Sherman, etc. to compel them to contribute towards the maintenance of Joseph Hurd their wives' father. The County Court gave judgment — That they should contribute.

Error — That daughters' husbands are not compellable to contribute to the support of their wives' parents.

Judgment — Manifest error.

The statute is — That every person who shall be poor and impotent, unable to support and provide for themselves having no estate, shall be provided for, etc. by such of their relations as stand in the line or degree of father or mother, grandfather or grandmother, children or grandchildren, if of sufficient ability — sons-in-law are not within the line or degree mentioned by the statute. Kirby's Rep. 155, Mack v. Parsons, etc.

TOWNER v. PHELPS.

**A writ which has been served and returned, may not after be altered for another action.**

UPON a writ of error, adjudged — That a writ which has been served and returned cannot have an existence as a writ, for another purpose, by being taken out of the files and served again.

CANON V. ABBOT, ADMINISTRATOR OF LEMUEL MOOREHOUSE, DECEASED.

**The return of commissioners upon an estate represented insolvent is conclusive against creditors.**

ACTION on note given by said Lemuel. Plea in bar — That on the 8th of January said Moorhouse's estate was represented insolvent and commissioners appointed to examine the claims of the creditors and to make return in one year; that they have made a return of debts allowed, to the amount of £669; that the time is expired, and this claim was never exhibited nor allowed.

Reply — That after said return was made an addition of £80 was made to the inventory of said deceased's estate; whereby said estate appeared to be solvent and a further time was allowed to the creditors to bring in their claims to the commissioners; who were reappointed, and the plaintiff exhibited this claim in due season to them.

Defendant rejoins — That said estate is insolvent, and the plaintiff ought to be barred, without that that said estate is solvent and sufficient to pay all the debts. Demurrer.

Judgment — That the rejoinder is sufficient. The doings of commissioners are conclusive upon the creditors, as to their claims, whether the estate eventually proves to be insolvent or not; otherwise it would be almost impracticable ever to have an estate settled: And it does not appear by the plaintiff's reply that his claim was ever allowed.

The case of Ponderson v. Avery, New London, September 1785, administrator of Mrs. Avery settled this point. That was an action of debt on book; the defendant plead that said deceased's estate was represented insolvent, commissioners appointed, to whom the plaintiff exhibited his account and the same was disallowed by said commissioners. The plaintiff replied, that said estate was not found to be insolvent, but was solvent sufficient to pay all the debts. Demurrer. Judgment — That the reply was insufficient. This judgment was affirmed in the Supreme Court of Errors.

BOWN'S EXECUTORS v. BURREL.

A general conveyance, made by an insolvent of all his estate for the benefit of his creditors, is not conclusive upon the creditors who disagree to it.

ACTION of ejectment for land. Issue to the jury. The plaintiff's title was the levy of an execution against Benedict, who was former owner of the land, made on the day of June A. D. 1789.

The defendant sets up title under a deed from said Benedict, dated in January A. D. 1789 to all his creditors, except one Greenleaf, the plaintiff being one, each to take in proportion to their debts; the plaintiff refused to have anything to do with the deed, and attached the land and had it set off upon execution for his debt.

The question in this case was — Whether Bennet's deed of his lands to all his creditors, except one was good; or was a fraudulent conveyance and void.

The jury found a verdict for the defendant. The court returned them to a second consideration. ADAMS and CHAUNCEY, JJ., were for accepting the verdict. The jury adhered to their verdict; but it appeared to the court to be a fraud upon both the law and the creditors for debtors thus to convey their estates, preferring whom they pleased. This is depriving the creditors of the remedy which the law gives them to secure and recover their debts.

The case of Hovey v. Clark et al. adjudged at Windham, March term A. D. 1788, was determined upon these principles, in favor of the attaching creditor, and is decisive of the point contended for by the plaintiff in this case. There the deed was given for the benefit of all the creditors, Hovey being one, refused to take by the deed, and attached the estate, obtained judgment, and had the land set off upon the execution; then brought his action for the land against the defendants, who held under the deed. Verdict and judgment was for the plaintiff to recover.

LITCHFIELD COUNTY, FEBRUARY TERM, A. D. 1791.

WELLES v. DEXTER.

Action of debt on judgment will not lie unless it appears the plaintiff cannot otherwise have the effect of his judgment.

UPON a writ of error it was determined; that an action of debt upon judgment is not sustainable, unless it appears by the plaintiff's declaration that he could not have the effect of his judgment without it; as where the debtor has absconded and concealed his visible property, and the plaintiff must have recourse to a foreign attachment for security or the like; otherwise the action will be considered as unnecessary and vexatious.

SKINNER ET AL. v. HENDRICK.

Parol evidence not admissible to prove that a specialty delivered to the party, was upon certain parol conditions.

ACTION of ejectment, for sixteen acres of land. Issue to the jury.

The plaintiff's title was under a deed given by Elisha Marsh, to one of his sisters. The defendant offered parol evidence to prove that said Elisha delivered said deed to his sister upon certain conditions, which had not been performed; and so said deed was void.

By the COURT. Parol evidence is not admissible, to prove a deed delivered to the party, to be an escrow; or to prove any parol conditions, which would defeat or control its legal effect and operation. Holt's Rept. Bushnel v. Pasmore, 213; Lothrop v. Bulkley, New Haven adjourned Superior Court, December 1772; where a parol condition was plead in bar of a note delivered to the plaintiff, and Babcock v. Steadman, adjudged upon a writ of error, that a parol condition cannot defeat or control a note delivered directly to the promisee.—Windham adjourned Superior Court December term, A. D. 1783.

SEYMOUR ET AL., ADMINISTRATORS OF BAKER, v. HINE.

A *scire facias* by an administrator of an officer, upon a judgment recovered on a bail bond, is not barred by the original debtor's paying the creditor, but he shall recover for what the officer has paid and for his fees.

SCIRE FACIAS declaring, that said Baker recovered a judgment before the County Court, in Litchfield, in September A. D. 1784, against said Hine and one Tyler, who is dead, for the sum of £120 debt, and forty-nine shillings and six pence cost; which has never been paid, etc.

The defendant plead in bar — That said Tyler was attached by said Baker a deputy sheriff, at the suit of one Dexter; that he gave bond with said Tyler to said Baker, for his appearance at court; that said Dexter recovered judgment against said Tyler, by default for the sum of £79 9s. debt and cost, before the County Court in December A. D. 1783, for which execution issued, and was returned *non est:* Upon which said Baker recovered upon said bail bond the judgment mentioned in the *scire facias*, by default; that soon after he settled and paid said Dexter the judgment he recovered against Tyler; and in consideration of £81 1s. 6d., received the 16th of January A. D. 1786, he discharged him from all judgments and executions and demands he had against him, on account of his being bound for said Tyler.

The plaintiffs reply — That after said Baker recovered said judgment, and before the date of said discharge, he paid Colonel Adams, attorney to said Dexter in said cause, £3 18s. 8d. for his fees; also agreed to pay said Dexter his debt; that the cost taxed in favor of said Baker, and his fees on said execution was £3 2s. 6d., which hath never been paid; of all which the defendant was notified previous to his taking said discharge.

The defendant traverses Baker's having paid Colonel Adams his fees; also his having agreed to pay said Dexter, and the defendant's being notified thereof, previous to said settlement and discharge. Upon which the parties were at issue to the jury.

The jury found that said Baker had paid Colonel Adams his fees, and had agreed to pay said Dexter his debt; of which said Hine was notified, and therefore found for the plaintiff to recover £7, and his cost; motion in arrest of judgment, that the issue is immaterial; upon the ground that the discharge of the original judgment by Dexter, which is agreed in the pleadings, consequently discharged all subsequent judgments which were dependent upon, and in aid of it.

The court was of opinion — That the motion was insufficient, and gave judgment for the plaintiff. Baker was liable to Dexter for the whole debt and cost; whatever he paid was rightfully paid and so far discharged Hine; if Hine afterwards had paid Dexter, he might have recovered it back in an action of *indebitatus assumpsit*, as for money paid by mistake: As to the cost taxed in Baker's favor, and the fees on the execution, Hine was his debtor and it was altogether at Baker's option whether he would take Dexter paymaster or not.

ADAMS v. KELLOGG.

**Petitions for new trial must be brought in the county where the trial was had.**

PETITION for a new trial in a cause appealed from probate, and heard and determined at Hartford, in Hartford county.

Plea in abatement, among other exceptions — That the petition ought to be brought to the court in the county where the original cause was tried. The plea was judged sufficient.

LIVINGSTON v. BIRD.

**A defendant may not introduce himself as a witness to prove his own bill filed against an obligation upon the Statute of Usury.**

ACTION upon a note; the plaintiff died after the service, and before the return of the writ; his executors enter and pursue the action; the defendant on the second day of the court's sitting filed his bill in chancery, upon the statute against usury; complaining that said note, by the corrupt agreement of said Livingston and Bird, hath included in and secured by it, more than lawful interest at the rate of 6 per cent. per annum, and is usurious and oppressive; and offers himself as a witness to

prove it. This was objected to, upon general principles, also upon the particular situation of this case. The court in such case, is directed and empowered by the statute to proceed in searching out the truth of such complaint, as a court of chancery, by examining the parties upon oath, or in any other way, proper to a court of equity; and if the plaintiff shall refuse to be examined upon oath, his action shall be nonsuited, etc. Courts of chancery do not admit parties to be witnesses in their own favor, any more than courts of law, except for a disclosure, and in this case, it would be especially improper and unsafe, as the original plaintiff is dead, who only was knowing to the matters complained of.

By the COURT. The defendant may not be admitted to testify as moved for; the defendant may appeal to the conscience of the plaintiff if living, and call upon him for a disclosure upon oath, of the facts alleged in his complaint, and this is agreeable to right reason, to the rules of proceeding in chancery, and is clearly what the statute meant and intended; for it provides, that in case the plaintiff shall refuse to be examined upon oath, he shall be nonsuited. If the defendant might prove his complaint by his own oath, there would be no need of this provision.

The plaintiff by his answer to the bill may make it necessary; nay he may compel the defendant by appealing to his conscience, to disclose on oath the truth respecting his own bill; but this must come from the plaintiff, and cannot be upon the motion of the defendant. The practice upon this part of the statute has been heretofore rather vague and uncertain and very little may be derived from it, which goes to illustrate or settle any principles. The original promisee being dead may be the misfortune of the defendant, but doth not alter the law.

## HUMPHREY V. WATSON ET AL.

**An averment against the express condition of a bond cannot be admitted.**

ACTION on bond. Plea in bar — That in December A. D. 1773, the plaintiff and Titus Watson were partners in trade;

that in A. D. 1774 they dissolved their copartnership; that said company were indebted to sundry merchants in New York; that the condition of said bond is to indemnify and save harmless the plaintiff from all the copartnership debts, which commenced in December A. D. 1773, and avers that the defendant and said Titus had fully paid all said debts, and indemnified the plaintiff.

Plaintiff replies — That the said partnership is described in said bond to have commenced in December A. D. 1773; whereas in fact, it commenced in December A. D. 1772; and was so meant and intended by said bond; and that there is a debt of £300 due Mr. Seabering, contracted after December A. D. 1772, which has not been paid.

The defendant rejoins — That he knew of no partnership, but the one described in the condition of said bond, and traverses its being meant and intended by the condition of said bond, to take in a partnership which commenced in December A. D. 1772, contrary to the express words of it. The plaintiff demurs specially.

Judgment — That the rejoinder of the defendant is sufficient. It not being competent for the plaintiff to make an averment contrary to the express words of the bond; besides the plaintiff hath not shown any breach of the condition of said bond.

MUNSEL ET AL. v. SANFORD.

**Where the defendant acquires title to the lands demanded, pending the suit the plaintiff must fail.**

ACTION of ejectment, for a piece of land. Plea in bar — That since the date of the plaintiffs' writ, one Calkins had an execution against the plaintiffs, by virtue of which he took said land, and had it set off to him as the law directs; and by deed of bargain and sale hath conveyed it to the defendant, whereby the defendant is become seized thereof.

Plaintiffs admit the execution, levy and deed of the defendant — But say that Tapping Reeve, Esq. was their known attorney in Litchfield; that neither he nor they were ever notified of said levy; and that the same is illegal and void.

Defendant rejoins — That neither said Calkins, nor the constable, who levied said execution, knew that said Reeve was their attorney, or that the plaintiffs lived out of the state. Demurrer.

Judgment — Defendant's rejoinder sufficient.

### Bacon v. Minor.

A witness interested in the question of fact on trial, may not be a witness.

Action of defamation; for saying that the plaintiff had forged a certain note. Issue to the jury.

Daniel Minor was offered as a witness and objected to, on the ground that he was a joint promisor in said note, and is sued for speaking the same words.

By the Court. Not admitted being interested in the question.

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**HARTFORD COUNTY, FEBRUARY TERM, A. D. 1791.**

### Hathaway v. Gillet.

A deputy sheriff cannot be bail, officer, and attorney in a cause.

Error to reverse the judgment of a justice given upon default, in an action upon a note, brought by Gillet v. Hathaway; declaring, that Oliver Hanchet was a deputy sheriff; that he gave bond for the plaintiff at praying out said writ; that he was the officer who served said writ; and that he appeared before said justice as attorney to the plaintiff, and obtained said judgment by default.

Error assigned — That a deputy sheriff may not be bail, officer and attorney in the same suit.

Judgment — Manifest error. For the statute expressly prohibits a deputy sheriff's appearing as an attorney in a cause in any court.

GRISWOLD v. GRISWOLD.

**A deposition drawn by the party and copied by a third person, not admissible.**

ACTION of account. A deposition was offered, which was first drawn up by the plaintiff, copied by another person, and sworn to with some additions, made by the justice. It was ruled out, except the part added by the justice.

HUMPHREY v. PISON.

**The doings of freeholders, no evidence in a trial of the title at law.**

ACTION of ejectment for land. Issue to the jury. Determined — That the doings of freeholders are not admissible as evidence, in a trial of title to the land.

CURTICE v. MASON.

**A writ of error must be brought in the county where the judgment complained of was rendered.**

IN a plea in abatement made to a writ of error, it was determined — That the writ of error must be brought to the court, in the county where the judgment complained of, was rendered.

WILLIAMS v. FRANCIS.

IT was determined upon a writ of error — That the death of the plaintiff, before judgment rendered against him for cost, discharged the bond, given for the prosecution of the action. For such judgment is not only erroneous, but void.

STRONG v. AVERY.

**It must appear from the plaintiff's declaration, in an action brought to the City Court, that the cause of action arose within the city.**

WRIT OF ERROR to reverse a judgment of the City Court, in an action on book, Avery v. Strong, in which said Avery declares in common form, and is described of the city of Hartford. Plea of tender. Verdict for the plaintiff.

Defendant moved in arrest — That the plaintiff had not averred in his declaration that the cause of action arose within the jurisdiction of said City Court. That two things were

requisite to give the City Court jurisdiction. 1st. That one or both of the parties, should live in said city. 2d. That the cause of action should arise within the limits of said city; and which must appear by the plaintiff's writ and declaration. This motion was adjudged insufficient by the City Court.

Error assigned — That said motion ought to have been adjudged sufficient.

Judgment — Manifest error. The City Courts are special limited jurisdictions; and it ought to appear on the record, that the actions which come before them, and the cause of action, are within their jurisdiction. This not being shown, it doth not appear that the City Court had jurisdiction.

HERD v. BISSEL.

**Parol evidence not admissible to explain or contradict writings.**

ACTION on note. Issue to the jury, on a plea of payment in part, and a tender of a sum in full. On the note was indorsed, April, A. D. 1789, £15 13s. 4d.; and the defendant produced a receipt from the plaintiff, dated 23d of June, A. D. 1789, for the sum of £15 11s.; the plaintiff said these were one and the same sum, and offered parol evidence to prove it.

But by the COURT. Parol evidence may not be admitted to contradict the writing, which must speak for itself; and the receipt and indorsement are so different dates, and for different sums.

TREASURER v. PATTEN.

**Where the penalty of a bond is prescribed by statute, the court will not undertake to chancer it.**

ACTION for the penalty of a bond given to oblige the defendant to observe the laws respecting excise. Verdict for the plaintiff, and the £200 penalty.

Defendant moved the court to chancer said bond.

By the COURT. There is no power short of the legislature, can do it; for it is the sum prescribed by an act of the legislature.

WILLIAMS v. WELLES.

Many matters which would be proper in a petition for a new trial, the court will not go into upon a remonstrance against a return of auditors.

RETURN of auditors, against which a remonstrance was made; stating sundry mistaken allowances in said return, which at the hearing the defendant was unable to correct; but is now abundantly able to do, etc. etc.

By the COURT. Such an inquiry might be proper in a petition for a new trial; but would be improper to go into upon the remonstrance.

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**TOLLAND COUNTY, MARCH TERM, A. D. 1791.**

BUEL v. DAVENPORT.

A bond upon a replevin is in lieu of the property attached or distrained.

ERROR to reverse a judgment of the County Court, on a replevin bond.

Case was — Davenport attached one Baxter's horse for a debt. Baxter replevied him, and Buel gave bond upon the replevin. Davenport obtained judgment in the original suit against Baxter and took out execution and committed him to gaol. Baxter took the poor prisoner's oath and went out of gaol. Davenport then brought a *scire facias* upon the replevin bond, against Buel; who plead the aforesaid matters in bar. The County Court adjudged said plea insufficient.

This judgment was affirmed by the Superior Court. The horse was attached and holden in custody of the law, to secure the eventual payment of the debt, and the replevin bond came in place of the horse, and nothing but an actual payment of the judgment or a release from the creditor could discharge said bond.

In the case of Webster v. Price, it was adjudged on a writ of error, at Hartford September Superior Court, A. D. 1773, that the replevin bond came in place of the property distrained

or attached, and that the bondsman had no alternative but to pay the damage, or return the property, where the original taking or distraining was lawful.

LEWIS v. LAWSON.

UPON a writ of error, in which error in fact and error in law were joined; a plea in abatement was put in on that account. The court ordered the error in fact to be struck out, and reversed the judgment for the error in law.

BURBANKS v. LEE.

*Indebitatus assumpsit* will not lie to recover back money, paid upon a judgment grounded on the confession of the party.

ERROR to reverse a judgment of Justice Foot in an action of *indebitatus assumpsit*, Lee v. Burbanks; declaring, that trusting to the cast of said Burbanks, he confessed judgment before Justice Cady on a note for £4 16s., when £3 only was due thereon, which he had been obliged to pay.

To which action a plea in abatement was given — 1st. That said Justice Foot could not take cognizance nor inquire into Justice Cady's judgment to reverse or alter it; said plea was judged insufficient. The defendant then demurred to the declaration; and the justice gave judgment, that the defendant's plea was insufficient and for the plaintiff to recover £1 16s.

Errors assigned — 1st. That said declaration was insufficient. 2d. That said justice had not answered the issue put to him.

Judgment — Manifest error, both as to substance and form. *Indebitatus assumpsit* will not lie to recover money back which has been paid upon a judgment by the confession of the plaintiff.

SOMERS v. BARKHEMPSTEAD.

Action of trespass on the case and not *indebitatus assumpsit* is the proper remedy where a pauper is illegally sent into a town.

ERROR to reverse a judgment of the County Court, in an action of *assumpsit*, brought by Somers against Barkhempstead for the support of one Jerusha Tudman a pauper.

Plea in bar — That in A. D. 1779 Robert Tudman, a foreigner, married said Jerusha, who then belonged to Stafford; that he removed and lived in said Somers four years, during which time Billings was his bondsman to said Somers; from thence he removed with his family to Barkhempstead, on the 2d of June A. D. 1788, and continued there to the 1st of June A. D. 1789, when he was removed by order of the selectmen of said town to Somers with said Jerusha and his family.

Question was — Whether as said Tudman was a foreigner, he could gain a settlement by comorancy.

By the COURT. He could not. Judgment in the County Court was for the defendants. This judgment was affirmed by this court — upon the ground that the plaintiffs had misconceived their action; for if they were injured by the illegal removal of said Tudman, etc. to their town, trespass and not *assumpsit* would have been the proper action, unless the paupers had been inhabitants of Barkhempstead.

STANIFORD ET AL., HEIRS OF STOUGHTON, v. HIDE.

The heirs or creditors, have right to appeal from the acceptance of the report of commissioners, allowing debts to the administrator.

APPEAL from the judgment of the Court of Probate, accepting the report of the commissioners on said Stoughton's estate.

Causes of appeal were — That said Hide was the administrator on said estate; that he represented it insolvent, and had commissioners appointed; that he was the only creditor that exhibited any claim against said estate; that he exhibited and had allowed by said commissioners a debt of £394, of which £170 consisted of articles charged on book, which by the Statute of Limitation were outlawed; that he had given no credit for the rents of a valuable farm, which he had had the improvement of for many years, and that there was nobody to contest his claim before said commissioners.

Plea in abatement — That the commissioners were by law the only judges in such cases and their doings were final and conclusive.

Judgment — Plea insufficient. The doings of the commissioners are final and conclusive upon the creditors as to their claims; but the administrator has a right to contest their allowances at law; and there is the same reason that the creditors, where the estate is insolvent, and the heirs where it is not, should contest at law, an allowance made to the administrator; otherwise there would be nothing to prevent his getting any allowance he pleased, in his own favor; and where there is the same reason, there is the same law.

This cause was heard upon the merits, and the judgment of the Court of Probate disaffirmed.

### Libret v. Child.

**An action will not lie against an officer, for not returning the execution within the return day, after the execution is returned and satisfied.**

Action for not returning an execution by the return day, commenced long after said execution was paid and returned, and no special damages alleged.

By the Court. The action is not sustainable and judgment for the defendant to recover his cost.

### Moulton v. Burbanks.

**In an action for assault and battery and false imprisonment, an allegation that the defendant forged a justice's name to a writ, by which he was falsely imprisoned doth not vitiate the declaration.**

Error to reverse a judgment of a justice in an action of assault and battery and false imprisonment brought by Burbanks v. Moulton, alleging that the defendant assaulted and beat him, and forged Justice Cady's name to a writ, by which he was falsely imprisoned. Plea not guilty. Judgment, that the defendant was guilty.

Error assigned — That the plaintiff's declaration is insufficient.

Judgment — That there is nothing erroneous; the plaintiff's alleging the forgery, is only by way of aggravation, and to show the means by which he was falsely imprisoned.

**WINDHAM COUNTY, MARCH TERM, A. D. 1791.**

ORR v. HANCOCK.

**If the condition of a mortgage is to indemnify against being surety for the mortgagor, and a sum in certain is mentioned, be the debts more or less for which he is surety — the mortgagor will be holden to pay for all the debts for which the mortgagee was surety, be they more or less.**

PETITION in chancery to foreclose the equity of redemption in an estate mortgaged to him by Gen. Palmer, which was afterwards taken by execution to satisfy a debt due to Gov. Hancock. At the time of taking said mortgage Gen. Palmer was indebted to Orr for orders drawn in his favor, and for his being surety for him to a considerable sum, supposed to be £300, and to secure Orr, against these debts, the mortgage was given; and in the condition of said mortgage, the sum of £300 is mentioned be the debts for which he was surety more or less. Orr proved that the debts secured by him for said Palmer, at that time, were £568, and that those debts were the object of the mortgage, although the sum of £300 only was expressed.

The court decreed — That Hancock should pay to the petitioner the sum of £568 by, etc. or be foreclosed of his equity of redemption.

BARKER v. WALES.

**A creditor to an insolvent estate cannot be a commissioner.**

APPEAL from an order of the Court of Probate in appointing commissioners and accepting their report on the estate of Nathaniel Wales, Esq.

Reasons for appealing were — That one of the commissioners was a creditor to said estate and had a large sum allowed him; and that said commissioners had disallowed a just claim of said Barker, due by note.

Upon the first reason, which was admitted to be true, the commission and all proceedings in the Court of Probate upon it, were set aside. It is of importance to creditors, that judicious and disinterested men be appointed commissioners; as their doings are final and conclusive, as to the creditors, where their claims are disallowed by them.

FITCH v. COIT ET AL., EXECUTORS OF JOSEPH COIT.

*Indebitatus assumpsit* will not lie, after a decree of foreclosure, to recover money back that was paid by the mortgagor.

ACTION of *indebitatus assumpsit* for £202, had and received by said Joseph; declaring that in A. D. 1782 he was indebted by two notes to said Joseph, one for £200 and one for £552 14s. 11d. lawful money; that he gave two mortgage deeds of lands worth £2000 as collateral security; that said Joseph in his lifetime sued him on one of said notes and compelled him to pay £202 and by an action ejected him from said mortgaged premises; that since his decease the heirs of said Joseph have petitioned and obtained a decree foreclosing his equity of redemption in said mortgaged premises, and that the same is worth much more than the sums due; that the consideration on which said £202 was paid has failed and that in equity and good conscience he ought to recover it back of said executors; that the defendants are the executors of said Joseph and have sufficient assets in their hands to pay it; that thereupon and upon the matters aforesaid they have become liable and assumed and promised, etc. Demurrer to the declaration.

Cause was continued to advise, and at the Superior Court in September A. D. 1791 judgment was — That the declaration was insufficient.

By the COURT. It is a principle in chancery not to decree a foreclosure unless upon examination it appears to the court that the debt, due on the mortgage, is nearly equal to the value of the mortgaged premises. This was considered and determined, when the decree of foreclosure passed. If that decree is not right, a petition of review, and not an action of *assumpsit*, is the proper remedy.

BREWSTER v. DANA.

A note for W. India goods, generally not the same as a note for W. India rum and sugar particularly.

A blank indorsement, till filled up is not evidence of an assignment or warranty.

ACTION of the case, declaring that he delivered to the de-

fendant who was an attorney-at-law, a certain note, given by Parmela to Shubael Gear for £20, payable in West India goods, which was indorsed to the plaintiff and warranted by said Gear to be recoverable; that he instructed the defendant so to pursue the collection of said note, that in case the money could not be recovered of said Parmela he might have his remedy against said Gear, which the defendant engaged to do; that the defendant obtained execution against said Parmela, committed him to prison, that he took the poor prisoner's oath, and the defendant took said Parmela's note directly to the plaintiff and discharged said execution; whereby he has lost his remedy against said Gear upon the warranty, and has lost said debt said Parmela being a bankrupt.

Plea — That the defendant did not undertake and engage in manner and form as the plaintiff has alleged, etc. Issue to the jury.

The evidence as stated and agreed to was — That about September 1786 the plaintiff sent the defendant a note to be collected on his account, of the tenor following, viz. I promise Shubael Gear to pay to him £20 lawful money worth of goods merchantable West India rum and sugar, to be delivered at Richard Spelman's, etc. on or before the 15th of June next, if not then paid to pay interest, dated 16th of February A. D. 1786, which note was indorsed Shubael Gear; that afterwards Zepheniah Swift, Esq. instructed the defendant in behalf of the plaintiff to prosecute said note in such way that in case the money should not be obtained from Parmela he might go back upon Gear, and the defendant considered himself bound to follow said instructions as attorney to the plaintiff.

The evidence was demurred to by the defendant, and the plaintiff joined in the demurrer, and the jury were discharged.

The court was of opinion that the evidence was insufficient and gave judgment that the defendant did not undertake and engage in manner and form, etc.

By the Court. The note set forth in the declaration is for West India goods generally; the note produced in evidence is for West India rum and sugar praticularly, and a recovery

for one would be no bar to an action for the other. 2d. A blank indorsement has no certain import until filled up with something wrote over it, and is not evidence that the property of the note belonged to the plaintiff, or that said Gear had warranted it to him, which were material points in the case and which, the evidence failed essentially of proving.

KEGWIN v. CAMPBELL ET AL.

**The verdict must answer the issue or it will be good cause of arrest.**

ACTION of trespass committed on land. Plea — That Joseph Campbell, one of the defendants, was seized and possessed in fee of the land on which, etc. This being traversed, the jury found that the defendant was not seized, etc. On motion in arrest, because said verdict had not answered the issue, judgment was arrested and a repleader ordered.

HOWARD v. LYON.

**On a remonstrance to a return of auditors; that they have allowed articles charged since the date of the writ — the court will inquire of the auditors as to the fact.**

RETURN of auditors. Remonstrance against said return — That the auditors had allowed articles charged since the date of the writ.

The court allowed an inquiry to be made of the auditors as to the fact — because this was out of their commission. Finding the fact proved the return was set aside.

WINSLOW v. THE HEIRS OF PARKURST.

**The heirs of a deceased co-obligor are compellable in chancery to pay the debt, where the surviving obligor is bankrupt.**

PETITION in chancery, showing that said Parkurst and one Gleason were jointly bound to the petitioner for £100 which had never been paid; that since the death of said Parkurst, judgment and execution had been obtained against said Gleason, and returned *non est*, and that he is become bankrupt; that said Parkurst left a plentiful estate, which has descended and come to his heirs the petitionees; that said Gleason was his executor, but never gave any bond for a faithful administration; and that he is without remedy at law.

The court upon inquiry found the facts proved; and ordered and decreed the heirs of said Parkurst should contribute and pay said debt to the petitioner in proportion to the interest they severally received of their father's estate.

CAREW v. BOND.

Action of *indebitatus assumpsit* will not lie where there is a written agreement, but an action on the agreement.

ERROR to reverse a judgment of a justice, in an action of *indebitatus assumpsit*, upon a written agreement; which was, that in case the plaintiff should be reduced to want, the defendant would let him have the improvement of twenty-six acres of land or £26 in money; that he was reduced to want and the defendant had let him have neither, and thereupon he became liable and assumed, etc.

There were long special pleadings, which terminated in a demurrer, and judgment was for the plaintiff to recover, and now the judgment is reversed.

By the COURT. Where the parties have entered into a particular written agreement respecting any matter, the remedy for any breach is upon the agreement; and not by action of *indebitatus assumpsit*.

BISSEL v. SOUTHWORTH.

Where a private river divides between adjoining proprietors, that no division fence can be made in the line — it is a case omitted in the law, and must be ruled by principles of reason and common justice.

ACTION of trespass, declaring that the defendant's cattle got into the plaintiff's inclosure, bounding upon Nachauge river and ate up his corn and grass, etc. Plea not guilty. Issue to the jury.

The facts in the case as admitted were — Nachauge is a small river, dividing the lands of the plaintiff and defendant; the plaintiff ploughed and mowed his side and the defendant pastured on his side; the river was no fence, and it was impracticable to maintain a fence in the dividing line between them, and very difficult keeping a fence on the banks of the river; the defendant turned his cattle into his pasture, and

they went across the river into the plaintiff's land, and ate his corn and grass.

Verdict upon second consideration, was for the plaintiff.

The court in giving their reasons to the jury, agreed, that where a river, which is not navigable, divides between two adjoining proprietors, their lands meet in the middle of the river; and where lands are so situated that a division fence cannot be maintained in the dividing line, it is a case not provided for in the statute, and must be governed by the principles of reason and justice; and he that keeps cattle, must so keep them, as to prevent their injuring the property of others. The improvement of lands by ploughing and mowing, is of great public utility, it is therefore to be encouraged and protected; and the defendant's turning his cattle upon his own land knowing of the situation, was a trespass upon the plaintiff.

ELDREDGE v. TOWN OF POMFRET.

**Towns liable to respond in damages to persons injured by the deficiency of their bridges.**

ACTION for neglecting to repair their highways, and particularly a certain stone bridge over a run of water, which was suffered to remain in a dangerous state, by means whereof, in passing it, his horse fell through and broke his leg, and died; damage £ .

Plea — not guilty. Issue to the jury. Verdict and judgment for the plaintiff to recover.

The law has made it the duty of the several towns in this state, to keep and maintain their highways and bridges in good and sufficient repair; and whoever suffers damage through their neglect, hath a right of action to recover for the damage.

DEWIT v. STANIFORD.

**An *indebitatus assumpsit* doth not lie by one partner in trade against another, upon their unliquidated accounts.**

ACTION of *indebitatus assumpsit;* declaring, that the plaintiff and defendant with two others were traders in company, in A. D. 1784, and indebted to Mr. Webb by note £297 6s.; that said Mr. Webb has recovered of him the whole of said

debt, amounting to £400; that said other two partners are bankrupt, and it is the duty of the defendant to pay one-half of it; and so raises the promise.

Plea in abatement — That there had been large trade and dealings carried on by said company; that the plaintiff had received large sums of the company's money, which hath not been accounted for, the accounts having never been settled. Demurrer.

Judgment — Plea sufficient. For it would be improper and impracticable for the court in this action to settle and adjust those accounts, which is the proper business of auditors to do, in order to find whether there is anything due to the plaintiff or not.

### Palmer v. Corbin.

**An averment against the express words of a written discharge, not admissible.**

Action of trespass, committed on land. Plea in bar a discharge — Which is, "September 13th 1790, received of Selah Corbin forty shillings in full of all book accounts, and of all other demands, from the beginning of the world to this day."

Plaintiff replies — That he gave said discharge upon a settlement of their book accounts, and on a dispute they had respecting a steer; that the trespass complained of was not thought of, nor included in said settlement or discharge; and is wholly the interest of one Mr. Talbot. Demurrer.

Judgment — Reply insufficient. The words made use of in the discharge include this trespass; and an averment contrary to the words of the discharge, is not admissible.

### Barret v. Hosmer.

**Where an ancient grant is made to erect a mill and raise a dam without limitation, a long course of practice will determine the construction of the grant.**

Action for a nuisance; by means of the defendant's raising his mill-dam and overflowing the plaintiff's meadow, etc.

The defendant plead in bar — A grant from the proprietors of Woodstock, to William Bartholomew, made in April, A. D. 1687, of the privilege of erecting a grist-mill and dam at

this place; that a mill and dam were accordingly erected by him, and had ever since been kept up and used by him, and those claiming under him; that his whole right and interest, had come down and vested in the defendant; and that said dam was in the same place, where it had ever been; and was ten inches higher than it used to be, it being necessary in order to raise a sufficient head of water to answer the purposes of said mill.

Plaintiff replied — That he had been possessed of his said meadow about forty years, and ever enjoyed it without molestation, until within a few years last past, the defendant erected his dam ten rods further up said stream, viz. twelve rods from the pitch of the falls, and raised it ten inches higher than it had been before; whereby his meadow and grass were overflowed, etc.

Defendant affirmed his plea, and traversed said dam's being twelve rods from the pitch of the falls. Demurrer.

Judgment — The defendant's rejoinder insufficient.

By the Court. Many of the ancient grants, made to individuals, of the privilege of erecting mills and dams, upon streams of water, are very general and have no limitation, with respect to the height, they might raise the waters, and flow the country round; they are therefore to be restricted by reason and justice; a grantee by practice fixes limits to his own grant, which he may not afterwards overleap, to the prejudice of another.

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**NEW LONDON COUNTY, MARCH TERM, A. D. 1791.**

BROWN v. DUNHAM

**A minor not liable for a fraud in a contract, who is incapable of making one.**

Error to reverse a judgment of a justice in an action of the case for a fraud, in the sale of a horse, brought by Dunham against Brown.

Plea in bar — That said sale on the 16th of March A. D. 1790 at which time the defendant was a minor under the age of twenty-one years, and under the care of his father.

Plaintiff replied — That the defendant had the appearance of a man of full age and was allowed by his father to trade. Demurrer. Judgment — That the plaintiff's reply is sufficient.

Error assigned — That the plaintiff's reply is insufficient and ought to have been so adjudged.

Judgment — Manifest error. The defendant being a minor under the care of his parent, was incapable of making a contract, except for necessaries, therefore could not be guilty of a fraud in contracting.

PETERS v. ROSSETER.

**A decree in chancery, without finding the facts that warrant it is erroneous.**

ERROR to reverse a decree in chancery of the County Court in a petition Rosseter v. Peters; wherein the County Court decreed a certain lease to be void, without finding any facts to warrant such a decree; which is assigned for error; and the judgment was reversed on that ground. The case of Horsford v. Alsop determined in the Supreme Court of Errors in June A. D. 1788 is a decision directly in point.

DOWNER v. LOTHROP.

**After the plaintiff has produced his book upon oyer, he may not alter it, so as to surprise the defendant on the trial.**

ACTION of debt by book. Issue to jury. Determined by the court — That the plaintiff after he has produced his book upon oyer, may not make any additions or alterations thereby to surprise the defendant upon the trial.

LARABEE ET AL. v. TRACY.

**In a prosecution upon the statute for damages done in the night season, the allegations must be direct and positive.**

ERROR to reverse a judgment of the County Court in a prosecution *qui tam* upon the statute against night walking; brought by Tracy against Larabee et al. in which he declares that on a certain night he had a quantity of pears taken from him and that he suspects that said Larabee et al. did the facts. Plea — Not guilty. Judgment — That they are guilty.

Error assigned — That the complaint is insufficient and contains no direct charge against the defendants.

Judgment — Manifest error. DYER, J., dissented. The mischief which the statute designed to remedy, was the difficulty in getting proof of disorders committed in the night season. The remedy it provides is to admit a well-grounded suspicion to come in the place of positive proof. The statute creates no new crime, nor marks out any new mode of process, for these were not needed; but makes that to be evidence which without the statute could not be. In this case the defendants are not charged nor convicted of having committed any disorders — but only of having been suspected by the plaintiff of having taken his pears.

In prosecutions of this nature, it is necessary that the information be grounded upon the statute; that the facts be charged directly and positively to have been done and committed in the night season; and four things are necessary to constitute the proof. 1st. That the disorders be actually committed in the night season. 2d. Some circumstances which point out the defendant rather than any other person. 3d. The complaint must be speedily made, that the defendant may be able to recollect and show where he was at the time when the facts are laid to have been committed. 4th. The defendant not being able under these circumstances, to give a satisfactory account of where he was and that he had no hand in doing the facts, will furnish pretty safe grounds to convict upon and raise a strong presumption of his guilt.

The same point was adjudged upon a writ of error at Litchfield, August A. D. 1774, between Bull and Kehore, in a prosecution upon the same statute.

This judgment was affirmed in the Supreme Court of Errors.

BUTLER BY HER CONSERVATOR v. BUTLER.

**A party may not be permitted to aver against a record.**

PETITION in chancery, showing that her brother Zephaniah Huntington, after her husband's death, appeared at the Court of Probate and in her name refused what was given her by will, and claimed dower without any authority from her; and prays that the proceedings in the Court of Probate may be set aside, and she have her dower in her said husband's estate.

Plea in abatement — That by the records of the Court of Probate it appears that said Zephaniah was her attorney at that time, and she ought not to be permitted to contradict the record.

Judgment — Plea sufficient.

DAVIDSON, A MINOR.

**A minor may appeal from a decree of the Court of Probate at any time during his minority.**

APPEAL from an order respecting the distribution of his father's estate by the Court of Probate.

Plea in abatement — That more than eighteen months had elapsed since the making of said order, and that he had no right to appeal until he should arrive to full age.

Plea judged to be insufficient. A minor in such case may appeal at any time, as well before as after he is of full age, provided it be within the time limited by the proviso.

AVERY V. CAPTAIN BULKLY AND HIS LIEUTENANT.

**The commanding officers of companies of militia, marching through the country — will be liable for disorders committed, by the soldiers under their command, which they knew of and did nothing to prevent or to detect and punish.**

ACTION of trespass, assault and battery. Plea — Not guilty, to the jury.

The facts in the case were — The defendants were the captain and lieutenant of a company of militia, who were marching in order through the country to a general training, under the command of the defendants; the abuse and assault

was committed by some of the company, under such circumstances, as that the defendants must have known it; and they took no measures to suppress it, or to detect and punish it, after it had happened.

Verdict passed for the plaintiff, and accepted by the court.

It is of great importance to the public that military officers do their duty when upon command and duly exert their authority to suppress and punish disorders committed by any under their command; and their neglect, may, as in the present case be construed a faulty omission of duty, which will render them liable in damages to the party injured.

### Hubbard v. Brown.

**A garnishee is not liable upon a *scire facias*, where his principal was not an absconding debtor, at the time the copy was left in service.**

Scire Facias against Brown as agent, factor, etc. to Robert Williams.

Plea in bar — That at the time of serving the original writ, and of leaving the copy with the defendant, the said Robert was not an absent absconding debtor; but was openly and publicly about and in company with said officer, when he served the said writ, and might have been taken. The plea was traversed and the issue put to the court.

The court found the facts stated in the plea, and gave judgment for the defendant.— By which two points were determined, viz. 1st. That in order to subject the garnishee, the principal must be an absconding debtor, at the time of serving the original process. 2d. That the garnishee may take advantage of this upon the *scire facias*.

### Lord v. Merwin et al.

**Where an action is for a cow laid to be worth £7 and £30 damages demanded, the case is not appealable.**

Action of the case for inserting his name in a certain rate bill unjustly, with the sum of forty-eight shillings annexed; by means whereof, he had a cow taken from him worth £7; to his damage £30.

Plea in abatement of the appeal — That the matter in demand doth not amount in value, £20.

Judgment — Plea sufficient. The plaintiff has valued his cow at £7, and has laid no other ground in his declaration for damages.

## Bellows v. Smith.

**Where a person engages to attend at court and give evidence he is to be supported by the party for whose benefit he attends.**

Action on bond for £40. Plea in bar — That said bond hath the following conditions, viz. Now if the defendant shall assign over and deliver to said Bellows, a book account he has against William Holdrige, with a power to sue and recover it, in Smith's name, for the plaintiff's use; and said Smith shall appear at court, make oath to said account, and do everything necessary to be done on the part of Smith, to support and enable a recovery of said account; then said bond to be void; and then avers that he has kept and performed the conditions of said bond.

The plaintiff replied — That the defendant had not kept and performed the conditions of said bond.

Issue to the court — It appeared that the defendant was a poor man; that he assigned and delivered to the plaintiff said account with a power according to the condition of said bond; that he attended the court and stood ready to swear to the account, but the cause did not come on; he then informed the plaintiff that he could not stay any longer at court, unless he would support him; which the plaintiff refused, and the defendant came away; and the cause was lost for want of the defendant's testimony.

The question in this case was — Whose duty was it to support Smith, by the condition of the bond, while attending court as a witness.

Judgment — That the defendant has kept and performed the condition of said bond.

## MIDDLESEX COUNTY, JULY TERM, A. D. 1791.

Hon. ELIPHALET DYER, Esq., *Chief Judge.*

*Judges.*

Hon. ANDREW ADAMS, Esq., Hon. CHARLES CHAUNCY, Esq.,
Hon. JESSE ROOT, Esq., Hon. ERASTUS WOLCOTT, Esq.

### DENNIE V. COUNTY OF MIDDLESEX.

**Special damages only given for the escape of a prisoner through the insufficiency of the gaol.**

THIS application was made to the County Court agreeable to the statute, and by appeal comes into this court; representing, that on the 23d of April, A. D. 1789, Dennie recovered judgment before the City Court against Isaac Atkins, for the sum of £25 18s. lawful money damages, and £1 5s. 6d. like money cost; for which sums execution was levied on Atkins's body, and he committed to gaol in said Middlesex county; and that he made his escape through the insufficiency of said gaol; and demanding his said debt of said county.

Plea in bar — That the plaintiff has a mortgage of said debtor's land in value to the amount of said debt; and that said Atkins escaped by the negligence of the sheriff, and not through the insufficiency of the gaol.

The plaintiff replied — That said escape was through the insufficiency of said gaol, without that that it was by the negligence of the sheriff. Issue to the court.

Judgment — That the escape was through the insufficiency of the gaol; and that the plaintiff recover £5 lawful money damages, and his cost.

The rule for giving special damages and not the debt, for which the person is imprisoned, was settled in the case of Staphorse v. County of New Haven, August Term, A. D. 1789.

ASA WORTHINGTON, ADMINISTRATOR OF DANIEL KELLOGG, 2D. AND RHODA KELLOGG, ADMINISTRATRIX OF AARON KELLOGG, AND LYDIA HOSMER AND ASHBEL CORNWELL, PLAINTIFFS IN A WRIT OF ERROR AGAINST BROOM AND PLATT.

**Where money is claimed by a person to belong to him, for which another has got an execution, his remedy is in chancery, to decree the payment, and to lay an injunction upon the execution.**

To reverse a decree of the County Court in chancery, upon the petition of said Broom and Platt brought against them; — showing that on the 27th of August, A. D. 1774, said Aaron Kellogg was indebted to the petitioners, the sum of £1097 18s. 1d. money of New York, and for security mortgaged to them a tract of land of the value of £1000; at the same time said Aaron delivered into the hands of Titus Hosmer, Esq. attorney to said Broom and Platt, notes in his favor against sundry persons to the amount of £178 9s. 5d. lawful money, indorsed to said Broom and Platt; and took from said Hosmer a writing acknowledging the receipt of said notes; also that the money which should be collected on them, after deducting the cost, should be applied to said debt; that said Hosmer had collected on said notes about £80 lawful money, which remained in his hands at the time of his death: That after his decease, the said Aaron Kellogg sued the said Lydia, as administratrix on the estate of said Titus, in an action of account for said moneys: She being ignorant of the aforesaid transaction, and supposing the said money to belong to the said Aaron, was advised by her counsel to let judgment go against her for said sum of £80, which she did, and gave her notes to said Daniel Kellogg 2d. for said sum in satisfaction of said judgment, by the direction of the said Aaron, and to whom the said Aaron owed nothing.

That by reason of a mortgage made of said lands to the Messrs. Amorys, prior to theirs, they are in a great measure defeated of that security, of all which the petitioners were ignorant: That said Daniel Kellogg since deceased, in his lifetime recovered judgments and executions on said two notes against the said Lydia, which are now in the hands of said Ashbel as an officer uncollected, amounting to the sum

of £98 16s. 2d. lawful money; that said Aaron is dead and insolvent; and the time of exhibiting said account against said Hosmer's estate is elapsed, whereby they are barred at law; and pray that said Lydia and said Ashbel be decreed to pay said moneys due on said executions to them, on account of their debt due from said Aaron; and that they said Lydia and Ashbel be discharged from all liability for the same to the heirs, executors or administrators of said Daniel and Aaron.

Plea in abatement — 1st. That said petition has not been legally served on the said Asa Worthington. 2d. That said Aaron has left heirs who have not been cited. 3d. That the petitioners have adequate remedy at law. 4th. That the facts stated do not entitle the petitioners to the relief prayed for.

The County Court found the first exception not true; and the others insufficient. And then proceeded to hear said cause upon the merits and found the facts stated in said petition to be true; and thereupon ordered and decreed that the said Lydia pay to the petitioners the sum of £88 16s. 10d. lawful money, the debt due on said execution exclusive of the cost; and that execution issue in their favor against her for the same; and laid the administrator of the said Daniel under a perpetual injunction, never to demand, sue for or prosecute the said Lydia, or said Ashbel on account of said debt.

Errors assigned — 1st. That said County Court ought to have adjudged said plea in abatement sufficient. 2d. That no decree ought to have passed in favor of the petitioners. 3d. That the whole sum in said executions is not decreed to the petitioners, yet the injunction goes to the whole.

Plea nothing erroneous — Lydia Hosmer and Ashbel Cornwell, two of the plaintiffs in error appeared in court by their attorney, and moved that they might be called and have liberty to disappear, as they did not wish to join in prosecuting said writ of error; which was allowed, and they disappeared, and said cause was prosecuted by the other plaintiffs; and upon hearing the cause this court is of opinion that there is nothing erroneous in the judgment complained of.

By the COURT. The petitioners' right to this money is clear and manifest, and an action of account would have lain against said Lydia for it; but as said Aaron had recovered a judgment against her, which she had satisfied by her notes to the said Daniel, on which he had recovered judgments and executions against her; the petitioners recovering against her at law must have been very doubtful; but had they recovered, it would have been no bar to said Daniel's executions; that ultimately resort must have been had to chancery for the proper relief. It is clear that the petition states matter sufficient for chancery to proceed upon; that the relief granted was proper; and that the injunction laid upon the administrator of said Daniel extends only to the debt in the executions, which was decreed to be paid to the petitioners.

GRIDLEY & SAGE v. STARR.

Where two plaintiffs attach the same person in several actions and one bail bond is given to the sheriff, conditioned for the appearance of the defendant in each — they cannot join in a *scire facias* against the bail.

SCIRE FACIAS upon a sheriff's bail bond indorsed to the plaintiffs — setting forth that said Gridley prayed out an attachment against one Whiting for a debt due to him; that said Sage also prayed an attachment against the same Whiting for a debt due to him; both returnable to the same court; and both attachments were delivered to the sheriff, who attached the body of said Whiting on both of said attachments, and took one bail bond from said Starr on both of said attachments; conditioned to be paid on said Whiting's failing to appear and answer in each of said actions; that said Whiting failed to appear in both of said actions and judgments were rendered against him upon default; the plaintiffs took an assignment of said bail bond and join in this *scire facias* upon said bond, to have judgment affirmed against the bail in each of their actions.

To which declaration the defendant demurred and for cause of demurrer especially assigned. 1st. That a *scire facias* will not lie upon a sheriff's bail bond, it not being a matter

of record. 2d. That the plaintiffs cannot join in their remedy on said bond.

Judgment of the court — That the declaration is insufficient, clearly on the ground that the plaintiffs cannot join in a suit upon said bond — and although the sheriff took but one bond in both actions, the plaintiffs' interest is several and their remedies must be several.

CORNWELL v. HOSMER.

A promise in writing, made in the city to the plaintiff, who lived in the city, by an officer who lived out of the city, to collect and pay to him a certain execution, against a debtor living out of the city, if by legal steps it was collectible; is not within the jurisdiction of the City Court.

ERROR to reverse a judgment of the City Court in Middletown given upon default, in an action brought by said Hosmer against said Cornwell; declaring that Frederick Man recovered a judgment against Gurdon Whetmore of the town of Middletown, before the County Court holden at said Middletown on the first Tuesday of November A. D. 1788, upon a note, which for a valuable consideration was assigned to the plaintiff, for the sum of £35 4s. 9d. lawful money, and had execution for said sum; that the defendant being constable of said Middletown, the plaintiff delivered to him said execution to collect; and the defendant in said city and within the jurisdiction of said City Court, in and by a receipt in writing under his hand by him well executed, acknowledged the receipt of said execution, and therein promised to collect said execution, if by legal steps, it was collectible, and would pay the money to the plaintiff in whom was the property of said debt; as by said receipt ready in court to be produced appears. And the plaintiff says that the defendant, not regarding his undertaking and promise, hath not levied, collected or returned said execution, nor in any way or manner performed his promise, although said money was by legal measures collectible of said Whetmore. Damage, etc. Judgment by default, and for the plaintiff to recover, etc.

Errors assigned — 1st. That the declaration is insufficient. 2d. It does not appear that the cause of action arose within

the jurisdiction of the City Court. 3d. It appears that both said Whetmore and said Cornwell were inhabitants of the town of Middletown and not of said city of Middletown. Nothing erroneous plead.

Judgment — That there is manifest error in the judgment complained of. The law constituting the City Court and investing and limiting its jurisdiction, is, "That it shall be holden on the second Tuesday in every month in said city; shall have power to adjourn from time to time, and shall have cognizance of all civil causes, wherein the title of land is not concerned, by law cognizable by the County Courts in this state; provided the cause of action arises within the limits of said city, and one or both of the parties live within the limits of said city."

By the COURT. The defendant failing to levy and collect said execution, is laid as the cause of action in this case, which must have arisen out of the city; as both the debtor in the execution and the defendant lived out of the city, and so the court had not jurisdiction.

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**NEW HAVEN COUNTY, AUGUST TERM, A. D. 1791.**

MERRIMAN v. WAY.

**A person interested in the question on trial cannot be a witness.**

ACTION of the case for words — declaring that the defendant had said that John Merriman, the plaintiff, had swore falsely and had perjured himself, in a certain trial before the grand jury upon a prosecution against Samuel Hough for stealing some grain, by testifying that Hough was the thief and had stolen the grain, and that Hough was acquitted. Issue to the jury on the plea of not guilty.

The defendant offered said Hough to prove the truth of the words; who was objected against, and by the court not admitted.

Hough is interested in the question. Besides, he cannot be indifferent, for the oath will not oblige him to testify, that he did steal the grain, although it should be true — for no man is obliged to criminate himself.

THATCHER v. HEACOCK & BENEDICT.

**Where a writ is directed to an indifferent person to serve, the law requires that the name and reasons should be inserted by the authority signing — and where the direction is to the sheriff, etc. or an indifferent person, in the disjunctive, it will abate.**

ONE of the defendants dwelt in New Haven county, the other in Litchfield county. The writ was directed by the attorney who drew it and in his handwriting, To the sheriff of the county of New Haven, his deputy, etc. or to William Leavensworth to serve, etc.

Plea in abatement — 1st. It appears said writ was served by said Leavensworth, and he hath not sworn to the service. 2d. That the name and direction to said Leavensworth were neither of them inserted by the authority who signed said writ; but were inserted without his knowledge, by the attorney who drew said writ. 3d. Said writ is directed to the sheriff, his deputy, etc. or to William Leavensworth in the disjunctive. 4th. Said Leavensworth is not called in the direction of said writ an indifferent person, nor does it appear that he is.

Reply — That the authority signing said writ saw and recognized the direction to said William Leavensworth.

Judgment — That the plea in abatement is sufficient. The statute is, that all writs shall be directed to the sheriff, his deputy or some constable, if to be had, without great charge and inconvenience. And in every case wherein the authority signing a writ shall find it necessary to direct the same to an indifferent person, such authority shall insert the name of such indifferent person, in the direction of the writ, and the reason of such direction; and if any writ be otherwise directed it shall abate.

The law is positive that the name of the indifferent person and the reason, shall be inserted in the direction of the writ by the authority who signs it, when he finds a proper officer

cannot be had, to do the service without great charge, etc. and of this the law has made him the judge; and his certificate, inserted in the direction of the writ, in his own handwriting is conclusive evidence of the fact. Kirby's Reports, 6, Lawrence v. Kingman.

2d. The direction is to the sheriff, etc. or to William Leavensworth, in the disjunctive; which has left to the discretion of the plaintiff what the law has invested the authority signing the writ only with, the power of deciding. Had the direction been to the sheriff and to William Leavensworth it would have been well — for at the time of signing it might be, that an officer was not to be had, but before serving one might be had, in such case the writ might be served by the officer.

As to the first exception, the law does not require that an indifferent person should make oath to the service; but if it did, it might be done after it is returned by leave of the court.

As to the fourth exception, the direction is to William Leavensworth by name, which shows him not to be an officer, but an indifferent person, in the sense of the law: If he is otherwise disqualified, by being connected with either of the parties, it was incumbent on the defendant to have pointed it out in his plea.

SHERIFF FITCH v. COOK ET AL.

**A prisoner who hath taken the poor debtor's oath must remain a reasonable time after the money left for his support, is expended.**

ERROR to reverse a judgment of the City Court in an action brought by said sheriff against said Cook, etc. upon a bond given him, conditioned that said Cook who was in gaol upon a certain execution, should abide a true and faithful prisoner.

Plea in bar — That on the 4th of February, 52 minutes after 2 o'clock in the afternoon, said Cook took the oath provided by law for poor prisoners, and money was left with the gaoler for his support, according to the rate stated by the County Court, until the 30th day of March following, including his dinner on said day; that after he had eat his dinner, at 3 o'clock on said 30th day of March aforesaid,

he left the gaol, there then being no money left for his support.

Plaintiff replies — Admits that said Cook took the oath aforesaid at the time specified in the plea, and says that five minutes after said Cook left the gaol the creditor left money with the gaoler for his support. Demurrer to the reply. Judgment of the City Court, that the plaintiff's reply is insufficient.

Errors assigned generally.

Judgment of this court — That there is manifest error in the judgment complained of. The law is to have a reasonable construction, it was made for the relief of poor imprisoned debtors, and may not be so construed as to work an injury to the honest creditor. The object of the law is, the sustenance of the debtor; and it could not be said with any propriety, that he was without sustenance at this time, being immediately after his dinner. See Sheriff Parsons v. Whetmore, Middlesex July Term, 1789.

NICHOLS & SCOVEL v. HEACOCK & BENEDICT, ADMINISTRATORS OF GEORGE NICHOLS.

Upon a plea in abatement, being judged insufficient, a *respondeat ouster* must be ordered. The record of a judgment cannot be amended upon the memory of the judge, after the court is over.

ERROR to reverse a judgment of a justice, in an action brought by said Heacock et al., as administrators aforesaid, against said Nichols et al., on a note.

Plea in abatement — That Susannah Nichols is joint administratrix with the plaintiffs and ought to have been joined in the action. The justice gave judgment that the plea in abatement was insufficient; and thereupon considered and gave judgment that the plaintiffs recover, etc.

Errors assigned — 1st. That said justice ought to have judged said plea in abatement sufficient. 2d. That he ought to have ordered a *respondeat ouster*. 3d. That he ought not to have rendered a principal judgment upon the plea in abatement.

The defendant in error moved — That the justice might have liberty to amend his record and set it right, by inserting

that he ordered the defendants to answer over; and that they failing to make further answer, he proceeded and gave judgment, etc.

By the COURT. This would be making a new record, and cannot be done; unless the justice has some minutes to amend by. The records of a court, for the best of reasons, are held to be of such uncontrollable verity, that they can be proved only by themselves, and no averments against them are admissible; and it would destroy that credit, which the law gives to the records of courts, if the judges after the term is over, might alter and amend them upon their memories. See Foot et al. v. Cady, adjudged at Tolland, March Term, 1790.

SHERIFF FITCH v. CLARK.

**An action of escape will not lie before the City Court, although the escape was in the city and the sheriff lived in the city; if the judgment and execution, on which the prisoner was committed, was rendered and granted out of the city.**

ERROR to reverse a judgment of the City Court, in New Haven, in an action brought by said Clark against said Fitch, for the escape of one Michael Peck; who was imprisoned upon an execution issued on a judgment recovered before Justice Buckingham, at Milford. The sheriff lived in the city of New Haven, and the gaol from whence said Peck escaped was within said city.

The defendant plead to the jurisdiction of said City Court — That the judgment upon which the execution issued, by which Peck was imprisoned, was recovered before Justice Buckingham, at Milford, out of the city of New Haven, and so said cause of action did not arise within said city. The City Court determined the defendant's plea in abatement insufficient. The plaintiff recovered.

Errors assigned — 1st. That the cause of action arose without the limits of said city. 2d. That the declaration is insufficient.

Judgment — Manifest error. The judgment on which the plaintiff declares, as the foundation of his action, was recovered

at Milford, out of said city; to which the defendant might plead, that there was no such record; and the plaintiff must prove his judgment and execution, as well as the commitment and escape, in order to recover against the gaoler; and although the commitment and the escape were in the city; yet these would not furnish a cause of action without a legal judgment and execution; any more than the nondelivery of twenty hogsheads of rum, which the defendant bound himself by bond executed out of the city, to deliver within the city. See the case of Cornwell v. Hosmer, adjudged at Middletown this circuit. Also, the next case Austin v. Sheriff Fitch.

AUSTIN v. SHERIFF FITCH, AS GAOLER.

**The sheriff in an action of escape may avail himself of the court's not having jurisdiction, which rendered the judgment, by force of which, the prisoner escaping, was imprisoned.**

ACTION for the escape of Richard Spelman; declaring, that said Spelman was committed to gaol on two writs of execution in favor of the plaintiff; one for £100, and one for £34 lawful money, both on judgments recovered before the City Court in New Haven; and that the defendant voluntarily permitted him to escape on both in the night of the 26th of January A. D. 1789; demanding £400 damage.

The defendant plead in bar — That as to the execution of £100, said Spelman and one Seth Turner, at Durham, in the county of New Haven, about the 5th of October A. D. 1786, wrote and directed a certain letter of recommendation to the plaintiff, of one Frederick Davis, which letter was delivered to the plaintiff in said city of New Haven; upon which the plaintiff trusted said Davis to that amount; and which said Davis failed to pay; and for that cause and no other, was the judgment and execution, for said £100 obtained against said Spelman; and that after the plaintiff recovered said judgment and execution against said Spelman, viz. in April, A. D. 1791, said judgment and execution being in force, said Seth Turner paid to the plaintiff £24 lawful money, which the plaintiff accepted; and in

consideration thereof, discharged him from all demands, on account of his having wrote said letter of recommendation with said Spelman. And as to any escape of said Spelman upon any other execution he says he is not guilty, and puts himself on the country.

The plaintiff replied — That said Spelman did at Durham, solely write and direct said letter of recommendation, which was delivered to the plaintiff, in said city of New Haven, etc. without that that said Spelman with said Seth Turner, did at said Durham write and direct said letter of recommendation which was delivered to the plaintiff in said city of New Haven. Upon which the parties were at issue to the jury; and also upon the plea of not guilty, as to the other execution.

The jury found the following verdict, viz.— That said letter was not wrote and directed by said Spelman and Turner at said Durham in manner and form as the defendant in his plea had alleged; and for the plaintiff to recover £ damages and cost; and as to the other issue the jury found the defendant not guilty.

Motion in arrest — That the escape of said Spelman upon both of said executions, is alleged by the plaintiff, to have been made, at one and the same time; and the jury finding the defendant not guilty as to one, by necessary consequence, acquits him as to the other. 2d. Said letter is expressly alleged to have been made and directed at Durham by said Spelman and Turner: The plaintiff in his reply, says it was made and directed at Durham, by said Spelman only; and the jury do not find it to have been made and directed within said city of New Haven; but found that it was not wrote and directed at Durham by said Spelman and Turner; so that it appears, that the cause of action in which said execution for £100 was recovered, arose out of said city. 3d. That said declaration is insufficient.

Judgment was arrested upon the second reason in arrest, for it is agreed in the pleadings — That the letter was made and directed at Durham; and the only question between the parties was, whether it was made by Spelman only, or by both Spelman and Turner: It is clear that the City Court had not

jurisdiction of said action; and the judgment was *coram non judice*, of which the gaoler hath right to avail himself. For if Spelman was not legally imprisoned, the gaoler is not liable for his escape. Wooster et al. v. Parsons, Kirby's Rep. 26. See Cornwell v. Hosmer, and Fitch v. Clark, *ante*.

## Ray v. Fitch.

**Error doth not lie against a judgment granting a new trial.**
**Error doth not lie against an interlocutory judgment before final judgment is rendered.**

Error complaining of the judgment of the County Court in granting a new trial upon the petition of said Fitch against Ray, in a certain cause; which after the new trial was granted, was appealed into the Superior Court and now depending and undetermined.

Errors assigned — 1st. That said County Court mistook the law in granting a new trial. 2d. That said Ray was not duly notified. To this writ of error, a demurrer was given.

By the Court. The writ of error is insufficient.

The statute is — "That the Superior and County Courts, shall and may from time to time, as occasion shall require, and as shall by them be judged reasonable and proper; grant new trials of causes, that shall come before them, for mispleading, or discovery of new evidence, or for other reasonable cause appearing, according to the common and usual rules and methods in such cases." The power given to the courts by the statute, granting new trials, in the causes which come before them, for the reasons therein enumerated, is a discretionary power, and it has been determined, that a writ of error doth not lie against a judgment of a court, merely for granting a new trial. Kimball v. Cady, Kirby, 26. And a writ of error will not lie against any interlocutory judgment, before final judgment is given. See Carpenter v. Childs, determined at Windham, March Term, 1790.

## BRENTNAL v. HELMS ET AL.

**An action will not lie upon a general promise of indemnity, upon a liability only in the surety to be sued or called upon, for the debt.**

ACTION of the case, declaring — That the plaintiff at the special instance and request of the defendants, and for their proper debt and duty, on the 15th of April, A. D. 17 became bound with them to the treasurer of the state in the penal sum of £101 5s., conditioned to pay £50 12s. 6d. by day of being the duties on forty-five hogsheads of rum; that the defendants in consideration thereof, assumed and promised to indemnify and save harmless the plaintiff, from all damages and cost he should suffer and pay on that account; that the plaintiff has been compelled to pay said debt, and been put to much cost; to his damage £80.

Plea in bar — That the plaintiff hath never paid one farthing of said debt nor been put to any cost on that account; nor hath he been sued, until the day of the date of the plaintiff's writ, when a summons was served upon him. The plaintiff demurred to the defendants' plea.

The question was — Whether the plaintiff, being liable to be sued, and to be compelled to pay the debt, is a good cause of action upon this promise of indemnity; by the plaintiff it was contended that it was.

By the defendants it was contended — That neither a liability to be sued, nor, being actually sued, is a good cause of action, upon a promise generally to save harmless and indemnify.

Judgment of the court — That the defendants' plea is sufficient. Where a man is bound for the debt of another at his special instance and request; the law implies an obligation or promise to indemnify him. But is it to indemnify him against a mere liability to suffer damage, or to indemnify him against the damage, which he shall actually suffer? It is undoubtedly the latter. 3 Wilson, 262.

One would suppose, that any doubt or difficulty which has

existed in resolving this question, would be obviated, by ascertaining with precision, the facts in the cases which are as follow, viz. The plaintiff becomes bound with the defendants for their debt, and at their request; the defendants in consideration thereof, promise to indemnify and save him harmless, on account of his thus becoming bound.

Now what is meant by indemnifying and saving harmless? The terms are synonymous, and mean the same thing; they certainly mean, that the defendants will indemnify and save the plaintiff from any and every loss and damage he may eventually suffer, by reason of his becoming bound for them. This is done, either by paying the debt, and thereby discharging the surety; or in case that is omitted, and the surety is obliged to pay the debt, by refunding to him the money and interest, and the expense and just damages for his risk and trouble; in either of these ways the surety is indemnified, and the defendants' promise performed.

Two things are necessary to be united, in order to furnish a good cause of action in any case, viz. A violation of a right, which in law language is an injury; and a damage. Injury without damage, and damage without injury, are neither of them alone a ground of action; and it very often happens in society, that men are exposed to suffer loss and damage, yet no action can be maintained until a damage is actually sustained. A man sells a piece of land and covenants to warrant and defend it, against all claims and demands whatever; suits may be brought against his grantee, for the land; yet the warrantor is not liable on his covenant unless his grantee is evicted; and in that case the covenant extends only, to defend the title against an eviction, or to render damages to his grantee, for the loss of the land, his expense and trouble in defending it. The latter is equally a performing of his covenant as the former: for the covenant is, that the grantee shall hold the land; but if he cannot, that the grantor will make it good to him, that is, will pay him all his just damages and cost.

If an action will lie in favor of a surety against his principal, because he is exposed to pay the debt of his principal, it must be, either to recover the sum he is liable for, or to

compensate him for the liability; if for the former he then will recover a sum of money from the principal, that he has never paid, and only, as the case may be, for the principal to recover it back again; for the creditor may never call upon the surety for it: If it be the latter, viz. for his liability only, and not for the debt, it will be difficult to find a rule of damages: Besides, if an action is maintainable on this ground, the surety may repeat his actions for this, from day to day, so long as he continues liable, as in case of a nuisance; and even after the principal has paid and discharged the debt, if the surety had at any time been liable, an action would be maintainable. The cases cited from the books respecting sheriffs, and respecting bankrupts, were they to be considered as authorities here, prove nothing for the plaintiff; for the escape of a prisoner in gaol on an execution, is a tort, committed upon the gaoler, and he thereby becomes debtor to the creditor; he may immediately pursue and retake the body, or have an action for the money.

In the case of bankruptcy, if a surety might have an action on the ground of his being liable only, it would be for damages merely, which is not provable under the commission; but Lord Mansfield in the case of Taylor v. Mills and Magnall, Cowper, 525, where the plaintiff had become liable before the bankruptcy, lays it down as a settled principle that the plaintiff, till damnified (which he could not be until he had been called upon and had paid,) could not bring an action; he did not pay the debt till after the commission issued, consequently his whole damage and cause of action, arose after the bankruptcy. Where the engagement to indemnify is special, to pay the debt when it becomes due and to indemnify, etc. the case would be otherwise.

### Hitchcock et al. v. Page.

**The want of a consideration in a declaration upon a parol promise is not aided by a verdict.**

Error to reverse a judgment of a justice in an action by Page against Hitchcock and Merriman, declaring that the

have been taken at the time when said copy was left. On which the parties were at issue to the jury.

And as to said levy of said execution upon land he says it is true he did levy, etc. yet he says that said land did not belong to said Richard but to and that said levy was by mistake and that he cannot hold said land thereby. To this part of the defense the defendant demurred.

The jury found that said Richard was an absent absconding debtor, etc. and as to that part of the reply which is demurred to, the court judge that it is insufficient, and that the plaintiff be barred as to so much of said debt as said land was appraised at, and that the defendant be examined as to the residue of said execution. Upon the principle that the plaintiff having taken and appraised off said land in satisfaction of so much of said execution, the defendant would consider herself no longer holden to retain that sum in her hands. See the case of Hubbard v. Brown, adjudged at Norwich, March Term, 1791.

BEACHER ET AL. v. COOK ET AL.

**The mortgagor is to be considered as tenant at will to mortgagee.**

ACTION of ejectment for a tract of land. Plea — Not guilty. Issue to the jury — who found a special verdict, that on the 14th of February 1761, Samuel Cook deceased, was well-seized of the demanded premises, and by deed of that date mortgaged them to Eliphalet Beacher, late deceased, for £70 payable by the 14th day of February A. D. 1766 with the interest; that said Cook ever after continued in the possession of said mortgaged premises, taking the whole profit thereof without account until his death, which happened in A. D. 1788, and never paid any part of the principal or interest of said debt, nor anything for rent, during his life; that upon his death his son Samuel one of the defendants, entered and ever since has possessed the same, taking all the profits to himself, without paying anything therefor; and that said Eliphalet the mortgagee, continued to live in said New Haven in the full possession of his reason, until the 1st of June A. D. 1777, when he died, leaving Reuben Beacher his

son, and Sarah a daughter, the wife of Seth Coleman, his only children and heirs; that on the 1st of September A. D. 1788, said Reuben died and left a daughter Sarah, the wife of Ephraim Coleman, his only child and heir; since which said Sarah Coleman the daughter of said Reuben Beacher has died, leaving the plaintiffs her children and heirs;— the jury put the question of law whether upon the facts aforesaid the defendants were guilty?

This cause was very ably argued by the counsel for the parties. And by the court — The law is so, upon the facts aforesaid, that the defendants are guilty, and give judgment for the plaintiffs to recover the possession.

Upon two grounds, 1st. It appears that the mortgagor and his son Samuel, continued in the possession with the knowledge and consent of the mortgagee and his heirs; doubtless upon the idea that the land would be equal to the debt and the interest, but be that as it may, the mortgagor is to be considered as tenant, at the will of the mortgagee and his heirs; and in this case to have remained in by the agreement of the mortgagee and his heirs.

2d. When Eliphalet, the mortgagee died, his daughter Sarah who was one of his heirs was a *feme covert;* and when said Reuben died, his only daughter and heir was a *feme covert;* whereby the right was saved, unless it be considered that the time began to run in the life of said Eliphalet the mortgagee, which could not be; for it is evident from the facts found, that the mortgagor was tenant at will the whole of that time. See Beach v. Royce, determined at New Haven last January.

## Wilford v. Kimberly.

**An agreement to accept something besides money, in satisfaction of a note for money only, does not make it appealable.**

Action on note for £101 money only and witnessed by two witnesses. To which the defendant plead in bar in the County Court, that at the date and execution of said note, it was agreed, that the defendant should procure a deed of certain

**FAIRFIELD COUNTY, AUGUST TERM, A. D. 1791.**

SCOVEL v. SMITH.

**A justice may not go out of his own town to try causes.**

ERROR to reverse a judgment of the County Court on a complaint of said Mary against said Smith, upon the statute to recover maintenance for a bastard child, brought before John McCoy, Esq. justice of the peace, belonging to Greenwich — both the parties belonged to Stamford, and said justice went into Stamford, and there took cognizance of said cause, and recognized said Smith to appear before the County Court and answer to said complaint.

Before the County Court said Smith plead this matter in abatement, and that there were justices of the peace residing and dwelling in said Stamford, who could judge between said parties; and that said proceedings were *coram non judice.* The County Court adjudged said plea to be sufficient; and for that cause this writ of error was brought. And by this court the judgment is affirmed. See the case of Palmer v. Palmer, determined at Fairfield, August Term, A. D. 1790.

BEACH v. HOYT.

**A defendant may avail himself of the statute respecting absentees, during the late war, on a hearing in damages.**

ACTION on note dated in A. D. 1776; judgment was given for the plaintiff last court upon a demurrer, and continued to this court to be heard in damages: The defendant now exhibits his motion in writing, that he may have the benefit of the statute respecting absentees during the war, in the assessment of the damages; alleging, that the plaintiff had been absent during that period and that he could not get to him to pay said debt.

The plaintiff replied that after judgment upon demurrer, the defendant could not resort to this defense, and besides it would now contravene the letter and spirit of the treaty with Great Britain. Demurrer.

Judgment — That the reply is insufficient; and the interest upon said debt was expunged during the war. This motion is perfectly consistent with the other defense which the defendant has made; as this does not go to the merits of the cause, but to the *quantum* of damages, and the treaty does not forbid the courts taking into consideration equitable circumstances, between the parties, in the assessment of damages, and is what the statute authorizes the court to do.

## Osborn v. Lloyd.

**A plaintiff may alter his reply to a plea in abatement put in in the County Court.**

**Where neither plaintiff nor defendant belong to this state, and neither person or property are attached and holden here, the court will not sustain jurisdiction.**

Action on book demanding £200; a copy was left with of in Fairfield county, as agent, factor and trustee to said Lloyd.

Plea in abatement — That at the date and impetration of the plaintiff's writ, the plaintiff and defendant were both inhabitants of the said city of New York; and that the defendant hath there a plentiful estate; that the articles charged in the plaintiff's book are all of more than six years' standing; and by a Statute of Limitation of the state of New York, they are outlawed.

To this plea a reply was made in the County Court, and judgment thereon; and the cause appealed, and now the plaintiff moved for liberty to alter his reply to the plea in abatement.

And by the Court. Liberty is given to alter his reply; he then replied that at the time of contracting said debt both the parties lived in the state of Connecticut. Demurrer.

It appeared upon inspection, that the defendant was not described as an absent absconding debtor; which only could enable the plaintiff to sustain this action, the defect was admitted to be fatal and judgment was, that the reply was insufficient.

GLOVER v. SHERIFF ABEL, AS GAOLER.

Where it appears by the plaintiff's own declaration that he cannot recover more than £20 the appeal must abate.

FOR the escape of a debtor who was in prison upon an execution in his favor for £5 6s. lawful money, officer's fees indorsed upon it forty shillings; and advancements for support of the debtor while in prison twenty-seven shillings; and avers that he has been put to £20 cost, etc.; to his damage £27. This cause was appealed; and now the defendant plead in abatement of the appeal, that the debt, damage and matter in dispute doth not exceed £20.

Judgment — Plea sufficient; for the rule of damages is the debt in execution, officer's fees, the debtor's support, where the debtor has taken the poor prisoner's oath, and the interest; which cannot amount to £20.

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**LITCHFIELD COUNTY, AUGUST TERM, A. D. 1791.**

BUTLER v. BRACE.

The court will not, in an action of trover, inquire after the value of the property on a plea in abatement of an appeal.

ACTION of trover for a horse valued at £22 lawful money, and the demand in damages £30. Verdict in the County Court for the plaintiff, and £6 damages; the defendant appealed. The plaintiff plead in abatement of the appeal, that the horse was not worth £20.

Plea judged insufficient — A horse is of uncertain value; the plaintiff having valued him at more than £20 in his declaration, it is not competent for him to say the horse is not worth so much, contrary to his own declaration. See Miles v. Troop, at New Haven, January A. D. 1790.

CHURCH v. CLARK.

An officer who collects money on an execution, is not obliged to carry it to the creditor, and no promise arises in such case, to pay, until a demand is made.

The Statute of Limitation is no bar to an action against an officer, who has received the money upon an execution.

ERROR to reverse a judgment of the County Court in an action brought by Church v. Clark; declaring, that in A. D. 1783, the defendant was deputy sheriff; and that he delivered to him an execution in his favor, against to levy and collect for £14 6s., that he accordingly collected the money on said execution, and ever since had kept it for the plaintiff's use; that thereupon the defendant became liable to pay said money to the plaintiff, and being so liable, did in consideration thereof assume and promise, etc.

Plea in bar — The Statute of Limitation, which is, that no suit or action in law or equity, shall be brought or maintained, against any sheriff, sheriff's deputy, or constable or any other person, for any default, or neglect, of such sheriff, etc. in their office and duty; but within two years next after the right of action, shall accrue, etc. To which a demurrer was given. Judgment of the County Court, that the plea was sufficient.

Error assigned — That the plea ought to have been adjudged insufficient, and for the plaintiff to recover.

The judgment of the County Court affirmed — Not because the statute is any bar to this action; for every officer, who has collected money on an execution is liable to pay it over. But the demurrer runs back to the declaration; and by that it appears, that this money was collected and received as an officer, who is not bound to carry it to the creditor. The law provides no pay for his travel; the law therefore does not raise a promise, in such case, to pay until a demand is made, and no special demand is laid in the declaration, and for this fault in the declaration, the judgment was affirmed.

LIVINGSTON v. BIRD.

Where a sum more than is just is included in an obligation by mistake, it is not usury and will not vitiate it.

ACTION on bond. The defendant on the second day of the sitting of the County Court filed his bill, complaining, that a

sum was included in and secured by said bond for loan and forbearance over the lawful interest, at 6 per cent, etc. and praying that the court would proceed as a court of chancery to inquire into the facts, and to render judgment agreeable to the law in such case provided; this cause came on to trial before this court upon said bill, said Livingston being dead, and the action prosecuted by his executors.

The defendant was offered to testify to the truth of the bill, which was objected to, and by the court not admitted; the statute is, "that in such case the court is directed and empowered to proceed in searching out the truth of such complaint, as a court of chancery, by examining the parties upon oath or in any other way proper to a court of equity." Courts of chancery do not admit parties to be witnesses in their own causes, any more than courts of law; and it would be peculiarly unsafe, in this case to admit the defendant, as the original plaintiff is dead. But the defendant might have appealed to the conscience of the plaintiff had he been living, to have disclosed the truth on oath; and this seems to be the meaning of the statute which says, "and if the plaintiff shall refuse to be examined upon oath, his action shall be nonsuited," etc. and the plaintiff may by his answer to the bill appeal to the defendant's conscience to disclose upon oath, the truth respecting the bill and answer.

The defendant then moved to prove his complaint by common law evidence, which was allowed by the court; and although a large sum appeared to have got into the bond more than was just, yet being taken by the late John Canfield, Esq. attorney to said Livingston, without any particular directions from said Livingston, who also was dead, the court were of opinion that it was included by mistake, and negatived the defendant's bill, and continued the cause to give the defendant an opportunity to prefer his petition in chancery, to have said mistake set right.

In January A. D. 1792, Bird brought a petition in chancery, against the executors of said Gilbert Livingston; stating, that in A. D. 178 he gave a bond for £200 to said Gilbert,

being for the balance due on a former bond, and by mistake in casting the interest and the payments, said bond includes more than £100 too much, and prays to have the error corrected. The court upon hearing the cause found that by mistake, said bond included more than was just the sum of £132 8s. 2d. New York money; and that said executors recover on said bond no more, than the just sum and the interest upon it.

The executors of Livingston afterwards brought their petition of review to the Superior Court in January A. D. 1793, stating, that they had discovered new evidence, whereby it appeared, that said former decree was founded on a mistake altogether, and that the bond complained of was right and just.

The facts in this petition were agreed by the parties, and the court, instead of opening said former decree and admitting the executors to recover this sum at law upon said bond, ordered and decreed said Bird to pay said sum of £132 8s. 2d., York money, and interest; and that execution go for the same: A caution against listening too readily to suggestions against persons who are deceased, and against debts deliberately secured by written obligations.

REYNOLDS ET AL. v. THOMAS AND JAMES BIRD.

**A note obtained by fraud and imposition may be avoided by pleading the fraud.**

ACTION on note dated 26th August A. D. 1789, for £23 6s.

Plea in bar — That on the 25th of June, A. D. 1783 said Thomas and one S. Crow, gave their note to the plaintiffs for the sum of £18 14s., the proper debt of said Crow; that the plaintiffs having discharged said Crow by cutting his name from said note, applied to the said Thomas and insisted upon his getting his father James Bird, to give a new note with him for said debt, and to induce him to do it, affirmed that said first note was no way paid or discharged, and that he would deliver it up to him no way defaced; that thereupon the said

James, by the procurement of the said Thomas, executed the note on which, etc. to the plaintiffs; and the plaintiffs, after having got the note on which, etc. delivered to the defendants said first note, which was signed by said Crow and said Thomas, with his said Crow's name cut from it; and thereupon say that said first note for which the note in suit was given, was discharged and satisfied.

The plaintiffs replied — That they ought not to be barred, without that, that said first note, was satisfied. Issue to the jury. The jury found that said first note was satisfied in manner and form as the defendants in their plea and rejoinder had alleged, etc.

The plaintiffs moved in arrest of judgment, that said issue was immaterial — 1st. Because, satisfied is a word of uncertain meaning and import, unless it appears how the note was satisfied. 2d. The plea admits the execution of said note, and goes only to the consideration for which it was given; and as stated in the plea is but a partial fraud and cannot avoid the contract.

Judgment — Motion in arrest insufficient. The term satisfied, in legal understanding, when applied to a note or a bond, is, that it is paid. The plea alleges that said note was discharged and satisfied; and points out particularly how — the plaintiffs traverse said notes being satisfied only; and by this they admit all the facts in the plea; and traverse only whether those facts amount to a satisfaction. The verdict is that said note was satisfied in manner and form as plead; so that the question to the court now is, upon the above state of the case, whether this was such a complete fraud as to avoid the contract? And whether the defendants may avail themselves of it by pleading?

As to the first point it is clearly a complete fraud. Had the defendants paid the money, instead of giving their note, they most certainly might have recovered it back in an action of *indebitatus assumpsit.*

As to the second; fraud as well as duress or usury or other

unlawful consideration, may be plead in avoidance of a deed, bond, or note.

The case of Ford v. Atwater, tried at New Haven adjourned Superior Court, A. D. 1773, is to this point; one Graham a bankrupt by the assistance of some friend put on the appearance and dress of a man of property, and applied to the plaintiff to purchase a pair of oxen; the plaintiff not being acquainted with his circumstances, but from his appearance and address, took him to be a man of property, sold him his oxen upon credit, and took his note for them; soon after Ford discovered that said Graham was a bankrupt, and a very great villain, and that the dress and appearance he wore, was not his own, but borrowed for the purposes of deception. Ford finding his oxen in the possession of said Atwater, who pretended he had them in keeping for Graham, demanded them and brought his action of trover for them and recovered, upon the ground that the property never passed out of him by reason of the fraud in the purchase.

### Moses et ux. v. Gunn & Lee.

Depositions admissible in *qui tam* prosecutions.

Depositions taken out of the state within twenty miles of the adverse party, notice must be given.

In a *qui tam* prosecution for an assault and battery committed upon the wife, it was determined, that depositions taken out of court pursuant to the statute, are admissible in actions of *qui tam.* Also determined, that depositions taken in this state within twenty miles of the adverse party, who lives out of the state, are not legally taken, unless notice is given. Whiting and Frisbie v. Jewet, Kirby's Rep. 1.

### State v. Brunson.

On an information for forgery, the person in whose name the forgery is, cannot be a witness to prove the forgery.

Information for a forgery. It was determined, that the person in whose name the instrument is forged, cannot be a witness to prove the forgery. Also, that comparison of the handwriting of the party, is admissible evidence in a criminal prosecution; and like all other evidence to be left to the triers to weigh and consider.

In an information v. B. Howard, for a forgery; Bradway, in whose name the note was forged, was not admitted to testify, although the note had been found by judgment of court not to be his note. Windham, March Term, 1789.

### State v. Nettleton.

**The handwriting of the person in whose name the forgery was committed allowed to go to the jury.**

**The person, to whom the forged instrument was passed, may be a witness.**

Information for a forgery. In this case the handwriting of Hall, in whose name the instrument was forged was given to the jury. It was also determined, that the person to whom the forged instrument was passed, might be a witness, notwithstanding he would be entitled to an action for his damage.

### Foot v. Foot.

**Equity will not interpose to relieve against the negligence of the petitioner.**

Error to reverse a decree in chancery of the County Court, in a petition John Foot v. Timothy Foot; alleging that Timothy prosecuted him for a forgery; that the jury on Saturday brought in their verdict, that he was guilty, which was recorded by the court; that a motion in arrest was made and exhibited to the court, and the cause laid over to the Tuesday following; that said Timothy under the cloak of fraternal love and tenderness, advised the petitioner to settle the matter, and save himself and family from the disgraceful punishment of the pillory, and offered that he would settle for a small matter; that he went home and advised with his family and friends, who in tears, advised him to settle by all means. And that he returned to court on Tuesday, fully determined to settle with his brother at all events; when to his great surprise his brother asked him the enormous sum of £60 lawful money, and threatened to prosecute him with rigor, unless he would settle and give him this sum. The petitioner being ignorant of said motion in arrest, did settle and gave said Timothy £50 lawful money, and secured it by seven pound notes, when in fact said verdict would have

been arrested, and said Timothy would finally have recovered nothing against him in said prosecution: Wherefore he prays the court to inquire into the facts, and order and decree said notes to be given up.

Plea in abatement — That the petition contains no sufficient grounds for chancery to interpose.

Judgment — Plea sufficient.

Error assigned — That said plea ought to have been judged insufficient.

Judgment affirmed — The whole ground laid in this petition, for the interposition of equity is, that the petitioner was ignorant of said motion in arrest, when he settled; which by his own showing, was his own fault and negligence; for he returned to court on Tuesday, and did or might have advised with his counsel before he settled.

EXECUTOR OF GEORGE WHITE v. WOODRUFF ET AL.

*Indebitatus assumpsit* doth not lie, where the party has a written security for his demand.

ACTION of *assumpsit*, declaring that in A. D. 1785 the said George had in his store a quantity of flour, which had been there so long, that he had forgot to whom it belonged; that he sold it for £14 4s. lawful money and delivered the money to the defendants, who were a committee of a school district in Sharon, the interest to be applied to the support of schooling in said district; that the defendants in and by a certain writing bound themselves to the said George, that in case an owner of said flour appeared and made out his right to it, they would repay said money and fully indemnify him from said owner; that Friend Griswold owned said flour, and had recovered a judgment against said George in his lifetime for said flour the sum of £18 lawful money, which the plaintiff was liable to pay; and that the defendants in consideration of said writing and the matters aforesaid assumed and promised the plaintiff to pay to him the sum of said execution and all cost and charges that might thereafter arise, and alleges a breach.

To this declaration the defendants demurred.

Judgment — That the declaration is insufficient. The plaintiff's remedy is upon the written security; *indebitatus assumpsit* doth not lie in such case. See Carew v. Bond, Windham March Term, 1791.

DOTY v. WHITTLESEY.

**Chancery relieves against accidents, and will lengthen the term of a foreclosure.**

PETITION in chancery — showing that on the 3d day of April A. D. 1790, he purchased a home lot of A. Hamlin, which lot was mortgaged to David Whittlesey, for a debt said Hamlin owed him, whereby it became his duty to pay said Whittlesey; that in February A. D. 1790, said Whittlesey procured a decree in chancery, that unless the money due on the mortgage from said Hamlin to him, was paid by the 1st of July A. D. 1790, the equity of redemption should be foreclosed; that he had paid a part of said money before the 1st of July; that in going after the remainder of the money, he was taken sick, and thereby prevented returning until the 10th of said July, when he offered the money and said Whittlesey refused it; and on the 16th he tendered him £45 9s. there being only £43 due, and said Whittlesey refused to accept it and insisted on £103 more. Praying that said foreclosure may be opened, and that said Whittlesey, upon his paying or tendering the remainder of said sum, be compelled to release said premises to him in a reasonable time.

Upon hearing the petition, the court found the facts to be true and granted the petition, and pass a decree accordingly; and that said Whittlesey pay the cost.

BUTLER v. CATLING.

**A parol agreement cannot operate to defeat a deed.**

**A respondent is not obliged to disclose anything that is irrelevant, or that will impeach him of a crime.**

**A petitioner may not impeach by other proof, the testimony of the respondent, to whom he has appealed, for a disclosure of the truth on oath.**

PETITION in chancery — showing that in an action of debt on book he recovered a judgment against Nathaniel Bruce by default for £200, for which he had execution, and levied

it on land which belonged to said Nathaniel, he having no other property; that said Catling had a clear deed of said land upon record, previous to his levy; that said deed is only a pledge to secure to said Catling a debt for less than the value of said land; that there is an agreement or defeasance given by said Catling to said Bruce, which lies in the private knowledge of said Catling, that upon said Nathaniel's paying said Catling his debt, he should reconvey said land to said Nathaniel; and prays that said Catling may be examined upon oath, touching said agreement and defeasance, he having no proof otherwise of said transaction; and having tendered to him £30 in lawful money, and £30 in state bills, which is in full of the debt due to said Catling, he prays said Catling may be decreed to release said land to him, etc. Also he agreed to waive any forfeiture which might be incurred by said transaction.

Catling appeared and was sworn; and declared that he had given said Nathaniel no obligation or defeasance, whereby he was holden to reconvey said lands upon any terms whatever; but that said deed was an absolute deed, as it imported to be.

Question by Butler — Was there no parol agreement to that effect? This question was objected to, as the answer, if in the affirmative, would be irrelevant; for no parol agreement can control or defeat a deed. By the court — The question is improper.

Second question put to the court was — Whether Catling was obliged to disclose any circumstances of fraud relative to said deed? By the court — He is not; for there is no such allegation in the petition.

Third question — Whether the petitioner may introduce other evidence to show that said Catling had told a different story? By the court — He may not; for he has appealed to Catling's conscience and put his cause upon his testimony; and it is not competent for him to impeach it or help it out by the testimony of others.

Petition negatived.

THOMPSON v. CHURCH.

In a prosecution for a private assault, the general character may not be inquired after, in order to establish the fact.

PROSECUTION *qui tam* for a private assault, brought upon the statute. Issue to the jury.

The plaintiff offered evidence to prove that said Church's general character was that of a malicious quarrelsome man; which was objected to, and by the court not admitted. The general character is not in issue; the business of the court is to try the case and not the man; and a very bad man may have a very righteous cause.

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**HARTFORD COUNTY, SEPTEMBER TERM, A. D. 1791.**

PERKINS ET AL., ADMINISTRATORS OF WILLIAM PITKIN, ESQ. v. ELIHU KENT, EXECUTOR OF THE LAST WILL AND TESTAMENT OF SAMUEL KENT.

Length of time with other circumstances presumptive evidence that a note is paid.

ACTION on note dated in A. D. 1765, given by said Samuel to said William, for £140 payable on demand, without interest. Plea of full payment, made by said Samuel deceased. Issue to the jury.

The facts upon the evidence were — That said Samuel died in October A. D. 1772, possessed of a plentiful estate; that said William died in A. D. 1789, near seventeen years after, without ever calling upon the defendant for pay upon said note, or informing him that he had such a note. Pease and Burbanks testified that at a certain time they heard said Pitkin say, he knew not what said note was given for, and offered it to said Burbanks without any consideration.

The defendant offered to give evidence, that said note was given for an indemnity in a certain case, and that said William had been indemnified; which was objected to, and by the court not admitted; the note must speak for itself.

The jury found a verdict for the defendant, which was

accepted by the court, upon the ground of presumption that said note was satisfied.

ALLEN v. VINING.

**Justice's jurisdiction in trials confined to his own town. The issue put must be answered.**

ERROR to reverse a judgment of Justice Collins, in an action *qui tam*, Vining v. Allen, for damage done in the night season. The justice belonged to Enfield, the parties to East Windsor, and the facts were committed in East Windsor, and there were justices in East Windsor who could judge between the parties. The justice gave judgment that having heard the evidences and pleas, he is of opinion that the defendant render to the plaintiff the sum of £1 5s. 9d. lawful money damages and his cost.

Errors assigned — 1st. That the justice belonged to Enfield, the parties to East Windsor, and the facts were done in East Windsor, where there were justices that could judge between the parties. 2d. That the justice had not found the defendant guilty.

Judgment — Manifest error, on both points. See Mary Scovel v. Smith, determined at Fairfield last August Term.

CORSA & BULL v. NICHOLS.

**In a petition for a new trial for mispleading; if the petitioner alleges, that he ought to have set up other facts, he must show that he can prove them; but if he says he ought to have traversed the plea of the adverse party and that it could not be proved, it is sufficient.**

PETITION for a new trial in an action on a note brought by them against said Nichols, in which he plead a special plea in bar; to which the plaintiffs made an insufficient reply; which was demurred to; and judgment — That the reply was insufficient. Alleging that they had misplead; and that they ought to have traversed the plea in bar, as it was not true, nor could the defendant have proved it.

Plea in abatement — That the petition does not contain sufficient reason for granting a new trial; that it does not go far enough, in that they have not stated how they could support their new reply. Demurrer.

By the COURT. The plea is insufficient. The plaintiffs have said all that they could say, upon the ground the petition goes. They say there is no truth in the plea in bar, and that the defendant cannot prove it. Whereas had the plaintiffs stated a new and different reply, such as they ought to have made, that would avoid the defendant's plea; in that case they must have shown, not only, that it was sufficient in point of substance, but that the reply was true in fact and also how they could prove it.

Same point was adjudged at Windham in March A. D. 1773; Stores brought a petition for a new trial, in an action Hovey v. him, for mispleading, and stated how he ought to have plead, but did not show how he could avail himself of the new plea, or that he could prove it; for this cause the petition was negatived.

AUSTIN v. HANCHET.

**In an action of ejectment, the doings of freeholders not evidence.**

ACTION of ejectment. Issue to the jury. By the court — It has been long since settled, that the doings of freeholders cannot be given in evidence to the jury. See Humphrey v. Pison, and Ray v. Tomlinson, *ante*.

TEMPLE v. BELDING.

**Interest upon a book debt contracted in New York not allowed.**

ACTION of debt on book. Issue to the court. Interest is claimed by the plaintiff upon two grounds, 1st. The debt was contracted in New York and by the custom of merchants, interest is allowed there. 2d. That it is just and reasonable.

By the COURT. Not allowed. See Smith v. Purdy, and Brown v. Hinman, *ante*.

STILMAN v. LYDIA HOSMER, ADMINISTRATRIX OF T. HOSMER.

**The bondsman for the plaintiff to appeal his cause, is liable for the cost the defendant recovers in the action.**

SCIRE FACIAS, declaring that Silas Dean, late deceased, brought his action of debt on book against said Stilman, which

cause said Dean appealed to the Superior Court, and Titus Hosmer, Esq. aforesaid gave bond upon the appeal; that said cause was put to auditors, and before the Superior Court holden at Hartford in September A. D. 1789, he recovered judgment upon the return of said auditors, against said Dean, for the sum of £13 debt and for cost £24; that he immediately took out execution on said judgment for the sums contained therein, which was duly returned *non est inventus*, and that said Dean had avoided, etc. praying for judgment against said Lydia for the sum in said execution and the cost.

Plea — That before the return of said execution, viz. on the 23d of September A. D. 1789, said Dean died. This plea was demurred to.

Judgment — That the plea is insufficient, and for the plaintiff to recover £24 damages, being only the cost, which the death of said Dean could not affect; as no return of *non est inventus* was necessary to subject the bondsman for the plaintiff to the cost.

The same point was adjudged at the adjourned Superior Court, holden at Windham, in December A. D. 1783, upon a *scire facias* brought by the County Treasurer v. Bissel, upon a bond given for one Robbin. The plaintiff, at praying out his writ, set forth the bond, judgment of court and execution, and a commitment of Robbin to gaol thereon, praying for judgment against the bail; to this declaration a demurrer was given, and judgment that the declaration was sufficient; for upon such bond nothing will excuse the bondsman but actual payment of the cost; and a bond for the plaintiff upon the appeal of his cause is within the same reason and within the same law, as to cost.

## Nichols v. Shaw.

**It is necessary to entitle the City Court to jurisdiction, that it appear that one of the parties belong to the city.**

**Suits are to be brought to the next court or they will abate.**

Error against a judgment of the City Court, in an action of debt by book, Shaw v. Nichols, in which was an averment that said debt was contracted in said city of Hartford; but

neither the plaintiff or defendant were described as belonging to said city; and that said writ was dated the 19th of March and made returnable to the City Court on the second Tuesday of May then next; which overleaped the City Court holden on the second Tuesday of April. The above matters were assigned for error.

Judgment — Manifest error on both points.

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**WINDHAM COUNTY, SEPTEMBER TERM, A. D. 1791.**

FITCH v. RIPLEY.

**An action upon a note for money, is appealable, notwithstanding it hath two subscribing witnesses, if either or both, are dead, or become interested.**

ERROR to reverse a judgment of the County Court, in an action brought by Ripley v. Fitch, on a note for £200, which had two subscribing witnesses, one of whom was dead. The County Court denied an appeal, because the note was for money only and had two subscribing witnesses.

Error assigned — That an appeal ought to have been allowed, as one of the witnesses was dead said note was not nor could be vouched by two witnesses.

Judgment — Manifest error. This point was decided in the Supreme Court of Errors, May last, in the case of Barker v. Coit; where one of the subscribing witnesses became interested by the death of the promisee, it was determined that an appeal lay.

WILLIAMS v. FITCH, SHERIFF OF NEW HAVEN COUNTY.

**In taking of depositions, although the adverse party lives more than twenty miles from the place of caption, if he has a known attorney, living within, twenty miles he must be notified.**

ACTION for the escape of Charles Hall from gaol. Issue to the jury.

Fitch offered depositions taken at New Haven, without notice to the plaintiff, who lived at Pomfret, eighty miles distant, or to D. Dagget, Esq. the plaintiff's known agent and attorney, who then was dwelling and residing at New Haven,

within twenty miles of the place of caption: Which were objected to for that reason; and by the court, adjudged not admissible; an opportunity to cross-examine a witness is very important to a party, and he may not be deprived of it, but by absolute necessity, or some positive law.

The statute is, that for certain reasons which are enumerated in the preamble, depositions may be taken out of court, "So as a notification, with reasonable time, be first made out and delivered to the adverse party (if within twenty miles of the place) or left at the place of his dwelling, etc. to be present at the time of taking such affidavit, if he thinks fit." Now it is clearly within the reason and equity of the statute, that where the party lives more than twenty miles from the place of caption and has a known agent or attorney living within twenty miles, that such agent or attorney should be notified; and this has long been the established construction, with respect to depositions taken out of this state. Kirby's Reports, 1, Whiting, etc. v. Jewel, etc.

STANIFORD v. HENRY DEWIT, JOHN DEWIT ET AL.

Chancery will not sustain a suit where there is adequate remedy at law.

PETITION in chancery; stating, that in A. D. 1781, the petitioner and said Henry, John and Bela Elderkin, entered into partnership in trade, the said Henry to be responsible for said John; that they traded largely and much property was acquired thereby; that said Henry had got a greater share of said company's interest into his hands, than belonged to him; and that said company was indebted to him the petitioner a large sum, and that their accounts had never been settled; and praying, that said Henry be obliged to account for the property he has in his hands; that said accounts be liquidated and settled; and that the court would order and decree, what shall be found to be right and just among all the copartners.

Plea in abatement — That the petitioner had an adequate remedy at law, by an action of account.

Judgment — Plea sufficient. Nothing appears from the stating in the petition, but what the petitioner's remedy at law is completely adequate.

SMITH V. SIMONS.

**A writing which for a valuable consideration, grants liberty to flow a man's lands for a number of years, is a lease within the meaning of the law, and must be recorded.**

ACTION for erecting a mill-dam on the west line of the plaintiff's land, across a stream of water, and flowing his meadow.

Plea — Not guilty. Issue to the court. The plaintiff proved his declaration.

The defendant then offered in evidence a writing under the hand and seal of Flint, the original proprietor of said land, executed in A. D. 1755; whereby, for the consideration of £5, he granted to those under whom the defendant claims, liberty of flowing said land twelve years without restriction, and for eighty years in the winter half of the year; viz. from the 15th of November to the 15th of May annually. This writing was not recorded.

The question put to the court — Whether this writing is a lease which the law requires should be recorded, or only a license?

By the COURT. It is a lease, and without being recorded is void as to purchasers. Judgment — That the defendant is guilty.

HOLTON V. RUGGLES.

**A party hath no right to appeal from a judgment which is in his favor.**

ACTION of ejectment; to which a special plea was given. The plaintiff demurred to a part, and traversed a part; the defendant joined the demurrer, and an issue upon the traverse was closed to the jury: The demurrer was heard, and judgment for the plaintiff; the issue was not tried nor any judgment upon it for damages, etc. The plaintiff appealed the cause; and now the defendant plead in abatement of the

appeal, that there was no judgment rendered in the County Court, from which the plaintiff had right to appeal; it being in his favor so far as it went.

Judgment — Plea sufficient; a party hath no right to appeal from a judgment which is in his favor.

### Spalding v. Dunlap.

Action of account for a certain note given by Abraham Shepard, for £100, in the name and favor of the plaintiff, which the defendant received to account for.

Plea — That the defendant is not bailiff, and receiver of the plaintiff, etc. Issue to the court. The note appeared to be a note given to the selectmen of the town to and for the use and benefit of the plaintiff by name. The question was, whether this proved the issue.

Judgment — That the defendant is bailiff and receiver to the plaintiff, and that he do account. The interest is the plaintiff's, and a recovery by the plaintiff will be pleadable in bar of any action, the selectmen may bring for the same cause in their names.

### Spalding v. Felch.

**If a female give a discharge of all demands for maintenance of a child, of which she is pregnant; and afterwards it turns out, that she was pregnant with two, the discharge will bar her remedy.**

Error to reverse a judgment of the County Court in a prosecution for maintenance of a pair of twins.

Defendant plead in bar — That on the 10th of March, the plaintiff agreed with John Adams, to accept £36 lawful money in full satisfaction, for the maintenance of the child with which she was then pregnant; and to discharge him and all other persons therefrom; and the said Adams paid the said Sila £36 lawful money, which she accepted; and thereupon, and in consideration thereof she made and executed the following discharge in writing, viz. Know all men by these presents, that I Sila Spalding have this day received by the hand of John Adams £36, for and on account of the maintenance and support of a child of which I am now pregnant, in con-

sideration whereof, I do acquit, exonerate, and fully and absolutely discharge the father of said child, of which I am now pregnant, of any demands I have against him; and any other person, shall have right to plead this discharge, who shall be prosecuted in my name, for or on account of said child: Dated, March 10th, A. D. 1791, Sila Spalding. Whereby the defendant is fully and absolutely discharged from all demands of the plaintiff on account of said child.

Plaintiff replied — That said discharge was obtained before said children were born, and before she knew she was pregnant with more than one child; when in fact she was pregnant with two children who have since been born of her body alive; and thereupon says she ought not to be barred without that, that she received of said Adams, said £36 in full satisfaction of all demands, she could, or might have upon him, and every other person on account of her pregnancy; and without that, that she executed said discharge to and for the use of said Adams, and every other person who might be prosecuted on that account.

The defendant affirmed over his plea, and joined issue to the court. The court found the issue in favor of the defendant, and gave judgment for his cost.

Errors assigned — That the plea in bar is insufficient, however the issue in fact might be; for that it is a general discharge of every body, and not given to the defendant: The minds of the parties did not meet in giving and receiving it; and not being plead by way of accord and satisfaction but as a discharge, it extends to one child only; whereas the suit is for maintenance of two.

By the Court. There is nothing erroneous in the judgment complained of; in such settlements the parties always run a risk; had the children been still-born, the money could not have been recovered back; and as the terms of the discharge are comprehensive enough to take in everybody she should accuse, and especially the father; and she having charged the defendant with being the father, he hath right to take benefit of it, and she cannot say the discharge shall not extend to him.

HUNTINGTON v. RIPLEY ET AL., COMMITTEE OF THE FIRST SOCIETY IN WINDHAM.

**Every reasonable construction is to be adopted in support of a verdict.**

ERROR to reverse a judgment of the County Court in an action brought by the plaintiff against said committee; declaring, that he was a sober dissenter from the established church in the first society in Windham, and belonged to a society of congregationalists in said society; that he attended public worship there, and contributed his proportion towards its support; and procured and lodged a certificate with the clerk of said first society, more than three years since, of his thus having dissented: Which certificate was accepted in legal society's meeting on the 27th of November A. D. 1786; and said society voted to excuse him from paying taxes for the support of the ministry in said first society; yet the defendants not ignorant of the premises, inserted his name in a certain rate-bill, made upon the list of A. D. 1787, and annexed thereto the sum of 18s-4. lawful money, as his proportion of said tax; which was for the sole purpose of supporting the ministry in said first society, and caused the same to be collected of him to his damage £12.

Plea in bar — That on the 16th of October A. D. 1740, it was voted in said first society, that the salary granted to the Rev. Mr. White, should be annually paid him, and that the committee for the time being should annually assess the inhabitants accordingly; that on the 12th of November A. D. 1764, it was voted and agreed in legal society meeting of said first society, that Mr. White's annual salary should be £100 to be paid on the 1st of November in each year, so long as he should continue in the work of the ministry; and that the committee for the time being should annually make out a rate to pay him; that the defendants being a committee of said first society, did make a rate in A. D. 1788, upon the list in A. D. 1787, and included the plaintiff's name therein as is alleged in his declaration; that in the limits of said first

society, there hath not been formed, nor hath there existed, nor doth there now exist, any distinct or separate church or congregation in which public worship is regularly maintained, according to the intent of the law, to which the plaintiff had adhered and paid.

The plaintiff replied — That there hath and doth exist in said first society a separate church and congregation, to which he hath and doth adhere and pay. Issue to the jury.

The jury found that there hath not been formed or existing, nor is there now existing, any separate or distinct church or society of separates, in said first society, composed and supplied with a gospel minister in manner as the law requires, to which the plaintiff has adhered, and that he has there contributed his proportion in manner and form as the plaintiff in his reply has alleged, and found for the defendants their cost.

Motion in arrest — 1st. It doth not appear that there was any vote of the society laying a tax on the list of A. D. 1787. 2d. That the issue is immaterial. 3d. That the verdict does not answer the issue, and is contradictory and repugnant, and finds part of the issue in favor of the defendants, and part in favor of the plaintiff. This motion was adjudged to be insufficient, and judgment rendered for the defendants.

Errors assigned — That the County Court ought to have judged said motion in arrest sufficient.

Judgment of this court — That there is nothing erroneous in the judgment complained of. The vote of said society in A. D. 1764, was a sufficient authority to the committee to make the rate. The issue is a material issue, and the jury have found it substantially in favor of the defendants; every reasonable construction is to be made in support of a verdict. Adopting this rule the supposed repugnancy will vanish and the verdict will read thus; the jury find that there is no such separate church or society existing, etc. to which he has adhered, and hath contributed his proportion, etc. Which directly negates the facts affirmed by the plaintiff in his reply, and traversed by the defendants.

## NEW LONDON COUNTY, SEPTEMBER TERM, A. D. 1791.

### CROCKER v. FOX ET UX.

**Action of waste lies against tenant in dower.**

ACTION of waste, declaring, that the plaintiff was seized of the reversion of a certain tract of land in fee, described in the declaration, of which the defendants were tenants in dower in right of the wife, for her life; that she had cut and destroyed the timber and wood standing upon said land, and committed waste to the disinheriting and damage of the plaintiff, etc.

Plea — Not guilty. Issue to the jury. The jury found for the plaintiff, and £20 damages.

Motion in arrest — That the declaration is insufficient, not being maintainable against tenant in dower.

Judgment — That the motion is insufficient, and for the plaintiff to recover. This point was decided at Fairfield, August A. D. 1772, upon a demurrer to the declaration in an action of waste, brought against tenant for life.

Exception — That this action was given in England by the Statute of Marlbridge, 52 Hen. 3d, which does not extend here. To which it was answered, that true said statute does not extend here; yet it is reasonable there should be a remedy in such cases, for the reversioner to recover his damages, and that reason was universal and ought to govern here. Judgment — Declaration sufficient. See Rose v. Hays, action of waste against tenant by the curtesy. New Haven, January Term, A. D. 1791.

### CAREW AND TOWN OF NORWICH v. HOWARD.

**The court will not arrest a verdict which is in favor of a town, on a motion of the town, because some of the jurors were related to some of the inhabitants.**

VERDICT for the plaintiffs last court, and £13 damages, with which the plaintiffs were dissatisfied; and moved in arrest of judgment, that Ebenezer Backus one of the jurors who tried said cause, was and is father to Ebenezer Backus

of said Norwich, who is one of the plaintiffs. The fact was admitted by the defendant; yet he says, that said connection was in the knowledge of the plaintiffs when the jury were impaneled, and they made no objection to said jurymen.

Judgment — That the motion is insufficient, and that the plaintiff recover; the Town of Norwich is the plaintiff to whom the juryman was not related; his being related to some of the members that compose the corporation, is a good challenge to the favor. The partiality in this case was in favor of the plaintiffs; and if the plaintiffs would not suggest it when the jury were impaneled, they may not afterwards take advantage of it in arrest, especially when it appears to have been in their knowledge, at the time the jury were impaneled.

## Mason v. Rogers.

**A deed, under certain circumstances given prior to the debt of the creditor will be deemed fraudulent.**

Action of ejectment for a tract of land. Plea not guilty. Issue to the jury.

The plaintiff's title was the levy of an execution against Samuel Rogers, father of said Isaiah, made in November A. D. 1790, and was for a debt contracted in October A. D. 1789.

The defendant set up title under a deed from said Samuel Rogers, executed in May A. D. 1789, and recorded; the consideration was, three £50 notes payable in cattle, one in four years, one in six years, and one in eight years, all without interest. The father was much in debt, when he gave the deed to his son Isaiah; and after giving the deed remained in possession, used and improved the land as before, and let it to his son upon shares: There was nothing to make the plaintiff suspect that the father had conveyed it away at the time of contracting the debt, or even to induce him to look at the record. The circumstances of fraud were very strong against the deed, the whole transaction appeared to be a mere trust between the father and the son, to secure the estate for

the benefit of the father. The jury found a verdict for the plaintiff, which was accepted by the court.

The question of law which came up in this case was — Whether, as the son's deed was several months prior to the plaintiff's debt, it was fraudulent as to him, whatever it might be as to other creditors who were such, at the date of the deed. It is evident that this piece of land was so conducted with by both father and son, as to make the plaintiff believe it was the father's, and was the principal ground upon which the plaintiff gave credit to the father: the deed being clearly fraudulent as to the creditors of the father; the land ought to be applied in discharge of the credit it had gained, by means of the false colors held out by both father and son.

## DAVIDSON v. DAVIDSON.

**Cost taxed against a minor in an appeal from probate.**

ALPHEUS DAVIDSON a minor by his guardian, appealed from an order of the Court of Probate making certain allowances to the widow the appellee. The decree of the court was affirmed, and cost taxed against the minor, as the appeal was taken in his name.

*Sed quere*, if it ought not to have been against the guardian, who controls the minor, and then it might be allowed or not in his account against the minor, as it should appear to the Court of Probate to be reasonable or not.

## HOSFORD ET AL., SOCIETY'S COMMITTEE IN MARLBOROUGH, v. LORD.

**Dissenters from the churches and societies, must pay the debts of the society, incurred before they went off from them.**

ERROR to reverse a judgment of a justice, in an action brought by said Lord against said committee, declaring that on the 1st of April A. D. 1787 he dissented from the church and congregation in the society in Marlborough and joined himself to the Episcopal church in Chatham; that he has

ever since attended the public worship with said Episcopal church and contributed his proportion towards its support; and before the 2d of January A. D. 1788, he obtained from Nathaniel Cornwell, warden and clerk of said Episcopal church, a certificate thereof and lodged the same on said 2d of January A. D. 1788, with the clerk of said society in Marlborough, and that the defendants being a society's committee of said Marlborough, for the year A. D. 1788, and not being ignorant of the matters aforesaid, did make a rate of four pence on the pound, upon the list of the inhabitants of said Marlborough, which was given in, in the year A. D. 1787, including the plaintiff's list, which was £155 10s. 3d.; and in said bill inserted the plaintiff's name with the sum of £2 11s. 8d. annexed; and have caused the same to be collected of the plaintiff, without law and right; for that no such tax was granted by said society of Marlborough, or in any otherwise; damage £ .

Plea in bar — That Mr. David Huntington in A. D. 1787 was, and for many years before had been and still is, the minister of said Congregational church in said Marlborough, regularly ordained and settled; and that said society covenanted and agreed to give him £90 per annum for his salary; and that on the 27th of December A. D. 1787, the plaintiff being an inhabitant of and belonging to said society, at a legal society meeting held in said society, voted and granted the sum of £90 to said Mr. Huntington for the year A. D. 1787, and appointed the defendants a committee to make said rate, etc. which they did and caused it to be collected. To which plea the plaintiff demurred. The justice gave judgment that said plea was insufficient, and for the plaintiff to recover.

Error assigned — That said plea ought to have been judged sufficient.

Judgment — That there is manifest error in the judgment complained of; because the tax is for a debt which had been incurred before the defendant dissented from the society in said Marlborough.

CURTICE v. SCOVEL.

A judgment entered by confession on an arbitration note for £20 conditioned to perform an award, is void.

WRIT OF ERROR, complaining of a judgment of a justice upon a note for £20, entered upon the confession of said Curtice, in favor of said Scovel, in words following, viz. September 11th A. D. 1790 at a court holden in said Colchester, Joseph Isham, jr. justice of the peace for New London county present, appeared David Scovel of said Colchester, Joseph Isham, jr. justice of the peace for New said James should confess a judgment against himself for the sum of £20 lawful money, due to the said David by note dated September 11th A. D. 1790, and accordingly said James did confess judgment for the sum due on said note to the said David; thereupon it is considered by the court, that said David should recover of said James the sum of £20 lawful money debt and that execution issue accordingly. Execution granted September 14th A. D. 1790; which note is in the words following, viz. For value received I promise to pay David Scovel £20 lawful money on demand, September 11th 1790, James Curtice; that said justice has granted an *alias* execution on said judgment, dated 26th of February A. D. 1791, on which is indorsed, that the sum of £1 5s. 9d. is canceled by the award of arbitrators. And the plaintiff says that said note was executed and said judgment rendered thereon, for the sole purpose of obliging the said James to abide the award of said Justice Isham and Mr. William Hubbard, arbitrators between the parties, and is without the jurisdiction of said justice and void: that no sum was then settled and agreed to be due, but the whole was subject to a future contingency, viz. the award of said arbitrators, and by this means a party would be without remedy in the law let the arbitrators be ever so corrupt, or the award ever so erroneous and mistaken in point of law or fact; that said arbitrators did not proceed according to their submission, but admitted illegal evidence in said cause, etc. wherefore and for other reasons apparent in the record the plaintiff in error prays said erroneous judgment may be reversed, annulled and set aside.

This writ of error was directed by the chief judge of the Superior Court, who signed it, to John Francis of Wethersfield to serve and return, etc. And the said John Francis gave bond for the plaintiff at the praying out of said writ that he should prosecute the same, etc. and said writ was served on the defendant in error by said John Francis.

To which the defendant in error plead in abatement, that said John Francis, to whom this writ is directed, as an indifferent person to serve, and by whom only it was served, was bondsman for the plaintiff at the praying out of said writ and thereby he became interested in said cause, so that by law he had not right to serve it. Demurrer to the plea.

Judgment — That the plea is insufficient; that it had been an immemorial practice for sheriffs, etc. to give bonds for plaintiffs at praying out of their writs, and their service of them ever been held good. See Town of Windham v. Town of Hampton, March Term, A. D. 1790. If there is any irregularity or defect in the service, advantage may be taken of it; but here is no complaint but what the service and return is well and properly made.

The defendant in error then plead specially and traversed all the irregularities in the proceedings of said arbitrators, complained of in the writ of error; to which the plaintiff demurred.

Judgment of the court — That the plea is insufficient and that the judgment complained of is manifestly erroneous.

By the Court. Arbitration notes, or notes given to bind a party to abide an award of arbitrators are not notes for the payment of money only — consequently it is now settled by a series of uniform decisions, that such notes although vouched by two witnesses, if for more than £4 are not within the jurisdiction of a single minister of justice to try; if for more than £20 they are appealable to the Superior Court. Such notes therefore are not evidence of a subsisting debt, and such was the note in the present case, made and delivered into the hands of the justice, who was one of said arbitrators, with the plain-

tiff's confession upon it; not that there was then anything due upon the note, but it was for the sum which should thereafter become due by the award of said arbitrators, if anything should be found against him.

This is not such a debt, nor such a confession of a debt, as the statute contemplates and authorizes a justice to make a record of. The whole proceedings are *coram non judice*, and void. Besides it is an illegal method to prevent a party from getting redressed at law against an award, however corrupt and erroneous it may be.

## Curtice v. Bulkley.

Writ of Error to reverse a judgment of a justice, entered up upon the confession of said Curtice to said Bulkley, upon a note in all respects similar to the preceding cause of Curtice v. Scovel, and judgment the same as in that case, both on the abatement and the merits.

The case of Sage v. Richards adjudged at New Haven adjourned Superior Court, December A. D. 1770 was — Sage executed five £20 notes to Richards to oblige him to abide the award certain arbitrators should make in a controversy submitted to them. He confessed judgment upon each of said notes for £20 debt, with cost allowed to be one shilling, and lodged them with said arbitrators, to oblige him to perform the award.

Error assigned was — That the justice had no right to receive and enter up judgment upon said note by the confession of said Sage as aforesaid.

Plea — Nothing erroneous.

Judgment — Manifest error. As the court did not give reasons in writing at this time, I am unable to state them; but presume the same reasons governed the court as in the preceding cases.

LORD V. MARVIN ET AL., SOCIETY'S COMMITTEE OF THE NORTH SOCIETY IN LYME.

**Conscientious dissenters, liable to be taxed, for debts incurred before they dissented.**

ERROR to reverse a judgment of the County Court in an action brought by said Lord v. said Marvin, etc.; declaring, that for eight years last passed he belonged to a church and society of Congregationalists: That on the 14th of April, A. D. 1788, he obtained from said church a certificate, that he belonged to their church, attended and contributed his proportion for its support, and lodged said certificate with the clerk of said north society; that said north society at their legal meeting holden on the 14th of September A. D. 1789, voted a tax of six pence on the pound upon the list of A. D. 1788, which was appropriated to ministerial purposes; that the defendants being a committee of said society, made up a rate-bill, and therein included the plaintiff's name with forty-eight shillings annexed as his proportion to pay; and for payment of which they caused a certain cow worth £7 to be levied upon, taken and sold. Damage £30. Writ dated 24th January A. D. 1791.

Defendants plead in bar — That said tax was laid to pay the arrears of salary due to Mr. Beckwith their former minister, who was dismissed from them in December A. D. 1785, at which time and for many years before the plaintiff was an inhabitant and belonged to said society.

Plaintiff replied — That the sum agreed to be paid to Mr. Beckwith, was by voluntary composition; that the tax laid would raise a much greater sum. Demurrer to the reply.

Judgment — That the reply is insufficient.

Error assigned — That it ought to have been adjudged sufficient; and now the judgment of the County Court is affirmed. It appears by the pleadings, that the tax was laid to pay a debt incurred while the plaintiff belonged to said society.

## Pride v. Peters.

**Witnesses interested in the question are not admitted to testify.**

Action of *assumpsit*, declaring that he was owner of one-eighth of a certain sloop of the value of £18 15s.; that the defendant sold his eighth part of said sloop and received the money for the plaintiff's use, and in consideration thereof the defendant assumed and promised, etc. Plea—*Nonassumpsit*. Issue to the court.

Upon the evidence it appeared, that this vessel was seized for being concerned in the illicit trade; Peters was the libellant, Colonel Halsey was the proctor that prosecuted, Pride and one Clark were improved as witnesses; the vessel was condemned to Peters upon his libel, and he sold the half of her for £75, and received the money. It further appeared that there was a special honorary agreement between them, that the plaintiff, Halsey and said Clark should share one-eighth of the net proceeds, when sold.

Judgment — That the defendant did not assume and promise. It is clear that neither the vessel when sold, or the money when received for it, were the plaintiff's — and if the plaintiff has any remedy it must be by a special action of the case, founded upon the particular agreement.

Colonel Halsey and said Clark were offered as witnesses, and it appearing that they had similar claims against the defendant, depending on the same facts, were not admitted.

## Peck v. State.

**On a petition for a new trial in a criminal prosecution on the ground of new evidence, and before judgment the cause was continued, the prisoner in such case admitted to bail.**

Petition for a new trial, stating that the petitioner was prosecuted and convicted by verdict of the jury before this court for counterfeiting certain pieces of coined money; that thereupon he was taken into custody and committed to gaol; that he was surprised with the testimony of some witnesses respecting certain facts which took place at Glastenbury; also with the testimony of Jacklin, a negro man, upon which the

jury convicted him; that he is able by certain new testimony to explain the testimony of the witnesses from Glastenbury; also to prove that the character of said Jacklin, negro man, is bad in point of truth and veracity, and prays for a new trial.

The court received the petition and continued it; judgment not being made up against him, he was admitted to bail.

## Holmes v. Williams & Crary.

**In the construction of a will the intent of a testator is to govern when consistent with the policy of the law, and the intent is ordinarily to be taken from the words of the will.**

Appeal from an order of the Court of Probate, in refusing to appoint freeholders to distribute a part of the estate of William Wheeler Sr. deceased, to his six sons-in-law and their heirs.

The case was as follows, viz. William Wheeler, Sr. was seized of said premises, and on the 13th of August A. D. 1747 made his will and devised as follows, viz. I give and bequeath to my grandson William Wheeler the farm I now live on, with the buildings, bounded as follows, viz. [bounds it out] to him my said grandson, his heirs and assigns forever; upon condition he pays to my granddaughter Hannah Wheeler £200 old tenor bills, when he arrives to full age; but in case my grandson William dies without issue lawfully begotten of his body, then I give said land, houses, etc. to my six sons-in-law, and my granddaughter Hannah Wheeler, to be equally divided between them. And wills that the remainder of his estate should be shared by his six sons-in-law, in equal proportions, etc.

William the grandson survived the testator, arrived to full age, and paid the granddaughter Hannah her legacy of £200 and entered and took possession of the estate. And afterwards by deed of bargain and sale with covenants of seisin and warranty, sold 200 acres of said land to said Williams, one of the sons-in-law for £800; the residue of said farm given him as aforesaid, he sold in like manner to said Crary, another son-in-law. for the sum of £1,100 lawful money: That William Wheeler the grandson was dead without issue of his

body; and said Hannah the granddaughter and all the sons-in-law, except said Williams and Crary, died before William the grandson; and Holmes the appellant is a son of one of the deceased sons-in-law.

The question was — What estate William the grandson had in the lands devised to him. Whether a fee-simple absolute, or a fee conditional, defeasible upon his dying at any period of his life without issue. If the latter, then there is no question but what it would go to the sons-in-law and their heirs, by force of the will. If the former, then the Court of Probate has done right, and the estate is well vested in the grantees of the grandson said Williams and Crary.

The court are of opinion — That William the grandson had an absolute fee vested in him, and affirm the doings of the Court of Probate.

It is an agreed principle of law as well as of reason, that in the construction of wills, the intent of the testator is to govern, provided his intent is consistent with the general policy of the law; and that his intent is to be collected from the will. 1st. It is evident from the will, that William the grandson was the principal object of the testator's bounty; and that the testator intended him a benefit at all events, by this devise. 2d. To make a provision for his granddaughter Hannah, out of the interest given to his grandson. And 3d. That none of his estate should be left intestate.

Now if, after he had given this estate to his grandson and his heirs, upon condition of his paying his granddaughter her legacy, on his arriving to full age, he had said no more in the event of his grandson's dying before he arrived of age, all his purposes would have been defeated; the grandson would have taken nothing; this part of his interest would have been intestate, and his granddaughter not have been provided for. Also further contemplating, that in case his grandson should thus die before he comes of age, and leave lawful issue of his body, it might be a doubt whether such issue could take the estate and perform the condition. To guard against and to

obviate all these difficulties which might arise, he adds the following clause; but in case my grandson dies without issue, etc. then I give, etc.

The question upon this case is — What time, dying without issue refers to, whether to any time indiscriminately, or to the time before he arrived of age.

The court are of opinion — That it refers to the latter only; for the following reasons: 1st. The words taken in connection with what precedes and follows evidently carry that meaning. 2d. It was not necessary they should extend beyond that period in order to answer the purposes of the will, for upon the grandson's arriving of age and paying the legacy, the estate would become vested in him, and the granddaughter be provided for, and no part of his interest be left intestate. 3d. If it refers to any time indiscriminately, then, if the grandson should be so unfortunate as never to have lawful issue, he could never call the estate his own, could never dispose of it let him live ever so long; which would be a disadvantage and an embarrassment to him that could never have been the intention of a benevolent grandfather to bring upon a favorite grandson, whom he designed to advance in life. 4th. The legacy was a gross sum ordered to be paid upon his arriving of age. In case the grandson had died immediately after payment, that which was intended for his benefit would have been to his disadvantage; for the £200 would have been paid out of his estate, without having any opportunity to reimburse it from the estate devised to him. The obvious intent of the testator, collectible from the will is, as though he had said, that in case his grandson William died without issue lawfully begotten of his body, before he arrived to full age, that then the estate should go to the six sons-in-law and the said Hannah, etc.

This judgment of the Superior Court was reversed in the Supreme Court of Errors, in June, A. D. 1795, for the following reasons, viz.

SUPREME COURT OF ERRORS, JUNE, 1795.

HOLMES ET AL. v. WILLIAMS ET AL.

ERROR to reverse a judgment of the Superior Court holden at New London on the fourth Tuesday of September A. D. 1791, affirming the decree of a Court of Probate at New London, holden on the 7th day of February 1791. Judgment of the Superior Court reversed, and the reasons for reversal, and the state of the case, as follows.

William Wheeler the elder being seized in fee of certain lands and tenements, on the 13th of August in A. D. 1747, devised the same in the following words, viz. To my grandson William Wheeler his heirs and assigns forever, on condition, he pay to my granddaughter Hannah Wheeler £200 old tenor bills, when he arrives at lawful age; but in case said William dies without issue lawfully begotten of his body, then I give said lands and house to my six sons-in-law and my granddaughter Hannah Wheeler, to be equally divided between them. It ought to be noted also, that in other parts of the will he devises lands to four of his sons-in-law mentioning them by name, and their wives, to hold in some instances to the son-in-law and his wife their heirs and assigns; and in others to the son-in-law his heirs and assigns forever. The testator died soon after making the will aforesaid, and the same was duly proved and approved, and William Wheeler the younger went into possession of the lands devised to him, and when he arrived at full age he paid the legacy to said Hannah; and for a valuable consideration sold said lands to William Williams and Nathan Crary, two of said sons-in-law, who went into possession of the same. William Wheeler the younger after having thus sold the lands died without leaving any issue, and without ever having had any issue; four of the six sons-in-law, to whom said lands were given after the death of William Wheeler the younger, as also Hannah Wheeler died before him: And the plaintiffs in error being heirs of those deceased sons-in-law, as well as of William Wheeler the elder, moved

the aforesaid Court of Probate for a distribution of these lands as parts of the estate of William Wheeler the elder, according to his will. The Court of Probate negatived the motion; and they appealed to the Superior Court, and the Superior Court affirmed the decree of the Court of Probate as mentioned above. The defendants in error are the two surviving sons-in-law, and the purchasers under William the younger; all the above facts appear, and the reasons given for the appeal and the pleadings.

The question before the court involves three points — 1st. Whether the limitation to the sons-in-law, and to Hannah Wheeler be in point of law good; or whether it be not too remote being to take effect after the death of William the younger without issue of his body, and therefore not good. 2d. Whether the sale of these lands by William Wheeler the younger will prevent the limitation from taking effect? 3d. What kind of estate (if any) had the sons-in-law and Hannah Wheeler in these lands by virtue of the limitation in said will, that is to say, whether the limitation over to them was as an estate for life or in fee?

It is agreed on all hands if the testator meant and it be the fair construction of the words he made use of, that the sons-in-law should have the estate, after an indefinite failure of issue of William the younger that the limitation of them is void. Such a limitation would tend to create a perpetuity, and in point of law would be, and in point of sound reason ought to be void: But if it be his meaning, and be also the construction of his words, that the limitation should take effect in case William Wheeler the younger should die leaving no issue, at the time of his death; under such circumstances the limitation by the laws of England would be good; and there can be no reason given why it should not be good in this state; that this is the grammatical construction of the words in the will cannot be doubted; a legal construction however is contended for in contradistinction to a grammatical one, viz. that a dying without issue, means not, leaving no issue at the time of his death; but means a failure of issue at any time, be it ever so

remote after the death: Agreeably to this construction was determined the case of Dormer v. Beauclerk, 2 Atkins, 308; and the case of Saltem v. Saltem, in 2 Atkins, 376; case of the Attorney-General v. Hind, 1 Brown, 170; and the case of Bigose v. Rinsley, 1 Brown, 178. And in giving his opinion in the last case Lord Thurlow says, to call a dying without leaving issue, the natural sense of dying without issue, is against all the cases; and yet the same Lord Thurlow says in giving the same opinion, that the grammatical construction of the words, dying without issue, is a dying without issue living at the time of his death, and that is the sense in general of those who use the words. And in giving his opinion in the case of the Attorney-General against Hind, he says, alluding to the construction he thought himself bound to put upon the words dying without issue or without heirs — "I am sorry the judges have thought themselves bound to construe wills contrary to their own opinion of the intent; the words if construed here otherwise than they have usually been, would overturn the rules of construction, though not the rules of law; if they have been always held to mean a distant dying without issue and it should now be held otherwise, it will shake the rules of property," etc. Lord Hardwick also in Dormer v. Beauclerk, says, "There was no doubt about the intention of the testator, but thought himself bound to make a decree contrary to that intention, because the legal import of words is different from a natural one."

In 1 Salk. 225, where the words of the will were to B. and the heirs of his body, and if B. should die without issue living, then to C. the limitation was holden to be good: In 1 Eqt. Abridg. where the words were, not having issue of the body, then living, then to D. to go over to D. for the residue of the term, this limitation to D. was holden to be good: In 3 Atk. 282, the testator willed and devised, if he should leave no legitimate son or daughter, who should leave any child behind them, that C. should have the estate both real and per-

sonal, etc. and the limitation to C. was decreed to be good. It is said by Lord Harcourt in 1 Peere Williams, 199, (though it is an obiter opinion) that a dying without issue shall be taken according to common parlance, viz. Issue living at the death.

"On a devise of a term for years to a son by name Henry for his life and no longer, and after his death, to such of the issue of the said Henry as Henry by his will should appoint; and in case Henry should die without issue, then to his brother Albenus for the residue of the time"— it was determined by Lord Chancellor Parker in 1 Peere Williams, 432, that the devise over to Albenus was good, and that the words dying without issue, or should die without issue should be taken in the vulgar sense; he observes however, "That there was a great diversity betwixt a devise of a freehold for life, to A. and if A. dies without issue then to B. and a devise of a term in the same words, because the words (if A. dies without issue) in case of an inheritance, are inserted in favor of the issue, and to let in the issue, after the death of the father; but in case of a term, these words cannot have such effect, for the father takes the whole, which on his death will not go to his issue, but will belong to the executors." The same observation he also makes afterwards in page 667 of the same book in giving his opinion in the cause Target v. Gaunt — it was determined in the case of Hughes v. Sayer, in 1 Peere Williams, 534, where C. having two nephews A. and B. devised the surplus of his personal estate to them, "and if either of them should die without children, then to the survivor;" that dying without children then living, because the immediate limitation over was to the surviving devisee. So in chancery proceeding 528, where A. devised portions to his four children, payable at their respective ages of twenty-one or marriage, and in case any of them should die before the time of payment or without issue, then his or their portion to go to the survivor or survivors, and his heirs; the same construction was given to the words dying without issue. In the 1 Peere Williams, 563, where the

testator gave his personal estate to his wife, and made her executrix, provided, that if she should die without issue by the testator, then after her decease, a remainder over, the remainder over was held to be good. In 3 Peere Williams, 258, where the words "without leaving issue," were made use of: In 2 Atk. 642, where the expressions were, leaving no heirs of his body: In 1 Peere Williams, 664, where the expressions were, leave no issue of their respective bodies; and in 3 Durn. 143, where the expressions were, leaving no issue behind him: In all these cases the words were understood according to their natural import, and the remainders over were held to be good, and those both in real and personal estates.

The case is stated in Fearne on Remainders, page 368, and is as follows; "W. C. left and bequeathed unto his daughter and only child, all his worldly substance, lands, stock, and debts, and household goods, provided she married by the consent of his executors therein mentioned: But in case she married without the consent of his executors, she was to have only twenty cows and a horse for her whole fortune; and after naming A. and B. his executors, he appointed that in case his said daughter should die without issue, all his substance should return back to his executors, to be distributed, as he should thereafter direct. And lastly, in case his daughter should marry without consent or die without issue, he appointed that all his said substance, etc. should return back to his executors, to be by them distributed in manner following, viz. to his nephew J. D. £100; to H. G. £50; to each of his executors aforesaid £50; to his daughter twenty cows and a horse only; and the remainder to be equally divided among the children of his sister E. F.

"The question was — Whether the limitation over of the personal estate after the death of the testator's daughter without issue, was good.

"The Court of Chancery in Ireland held it was; and their decree was confirmed by the House of Lords here, upon the

opinion of the judges, that the bequest over was to take effect on the death of the daughter, without issue then living."

Thus stands the case as decided in Westminster Hall. It is very probable, if the question was to come up now as a new one there, the judges would determine according to the natural and grammatical construction of the words: In this state where the policy is not to force a construction to favor heirs, there can be no doubt, what the true construction, of dying without issue lawfully begotten of his body ought to be; the sense is, if there be no issue living, at the time of his death, the same construction ought to be put on the words here, as was formerly in Great Britain put on them, when applied to personal and household estate.

As to the second question, it is very clear that the testator did not intend, the sons-in-law should be defeated of their interest by any act of William Wheeler the younger, in case of his dying without issue; it would be very unreasonable that they should be so defeated, and on the foot of reason only we may say it is impossible, to be sure, if any interest had vested in them at the time when William the younger sold the estate. And that an interest, and a descendible one to, had vested in them, is clear from the case of Marks against Marks, in 1 Str. 199, as well as from other authorities. The case of Pells v. Brown in Cro. James, 590, is decisive, that an executory devise cannot be prevented or destroyed by any alteration or sale of the estate out of which or after which it is limited; Fearne on Remainders, page 306, also lays down the same principle: And we are of opinion that the sons-in-law took by way of executory devise; that is, that William Wheeler the younger was seized in fee of this estate, of course the limitation to the sons-in-law could be good, but by executory devise: Had William the younger been tenant in tail, there could have been no dispute about the meaning of the words, dying *without issue of the body*, because in such case a limitation over would have been good after an indefinite failure of issue: But suppose he was tenant in tail he could not defeat the remainderman by executing a common deed of bargain and sale

of the lands, but the conveyance must be by fine, or by suffering a common recovery.

It is now to be considered whether the sons-in-law took an estate in fee, or only an estate for life; it being once determined that the technical words necessary to convey a fee in a deed, are not necessary to convey a fee in a will, but that the intention of the testator is principally to be regarded as the rule of construction; there can be no doubt but the sons-in-law as well as Hannah Wheeler took a fee a descendible interest, and which their heirs would be entitled to take, if they (the sons-in-law or said Hannah Wheeler) should not be alive, at the death of the grandson without issue of his body: If the testator intended they should take but an estate for life; Why did he not say so, in so many words? Why is he totally silent with respect to this estate, after the death of the tenants for life? If they are so to be construed; Why doth the testator say that this estate should be equally divided among the sons-in-law and said Hannah Wheeler, if they each were to have but a life estate? Because if one or more of the devisees should die before William the grandson, it could not be equally divided between them as some could not take. Not to mention the absurdity of giving a life estate to these uncles of the grandson, to take effect after the death of the grandson, who probably would outlive them: It may be very doubtful whether the modes of expression, accompanied with the other circumstances in this case, would not be sufficient to give the sons-in-law and the granddaughter a descendible interest even in Great Britain, where the judges are so hedged in, and fettered with technical rules, as to be obliged in some instances on questions of this sort, to decide contrary to the intent of the testator, and to what they think is sound sense; but let us see what their decisions have been.

The general rule there is — That it is not necessary, in order to convey a fee by a devise, that the words " to him and his heirs forever," should be made use of, as in a deed; but a

devise to a man and his assigns, to a man and his children, to a man and his issue, will create a fee; it is said however by Lord Chief Justice DeGrey, in 3 Wilson, 418, that if a testator devises his lands in several parcels to divers persons, without any words denoting a limitation, the devisees will have but an estate for life. It is also said by Lord Mansfield, in Doug. 734, that a devise of all a man's estate, the same lying at a particular place, will carry but an estate for life; but that a devise of all a man's estate, without any words of limitation at all, if it be not mentioned where it lies, will carry a fee.

What difference there is in these several instances put, it is difficult to ascertain; and why in each case a fee would not pass, no solid reason can be given: And Lord Mansfield in giving his opinion in the case in Doug. above cited, plainly showed what rule of construction he thought ought to have been adopted, had it been a new question; and of course how he would have decided the question in this state; his words are, "I verily believe, that in almost every case, where by law a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted; for ordinary people do not distinguish between real and personal property. The rule of law however is established and certain, that express limitation or words tantamount are necessary to pass an inheritance; all my estate, or all my interest, will do; but all my lands lying in such a place, is not sufficient; such words are considered merely as descriptive of the local situation, and only carry an estate for life; nor are words tending to disinherit the heir-at-law, sufficient to prevent his taking, unless the estate is given to somebody else."

In personal estates common sense prevails as to the construction of a bequest; in real estates it does not, and principally because it is the policy of Great Britain to keep estates in families and not to suffer the heir to be disinherited, as is said by Lord Mansfield, but by express limitation or words

tantamount; no such policy however obtains here; all the heirs are as much entitled to the real as the personal estate, but in Great Britain, if a man in his will express himself thus, "I give my houses to A. B. to pay my debts," those words carry a fee. So a devise to A. B. to sell, is a fee, or a devise of houses charged with debts, which takes money out of the pocket of the devisee, is a fee. So it is laid down by Lord Chief Justice DeGrey, in 3 Wilson, 418 — the following words were determined by three judges against Holt, Chief Justice, to carry a fee, as reported in 2 Lord Raymond, 832. "I give ratify and confirm to my son John Billings by such time and term for years, which now is or at any time after my decease may happen to be in my power to dispose of in whatsoever I hold by lease of J. N. and I. S. and also the house called the Bell Tavern, in St. Nicholas lane, together with the stable thereunto adjoining."

And Lord Chancellor Talbot, a man of excellent sense and a very sound lawyer, determined, that a fee was carried by a will worded thus, "As to my temporal estate with which it has pleased God to bless me, I dispose of the same; I will that my debts be paid," after which he disposed of several pecuniary and other personal legacies, gave four shillings per week to a relation for her life; then came these words " all the rest of my estate, goods and chattels whatsoever real and personal, I give to my beloved wife whom I make executrix " — the case is reported in 3 Peere Williams, 294-298; and the reporter says the Lord Chancellor with great clearness, decreed that all the real estate did well pass by the will, to the testator's wife and her heirs; then, on carefully attending to the authorities on this subject in Great Britain, and their applicability on this state, as well as to the plain construction of this will apart from all authorities, we have no doubt that the three propositions or questions before mentioned are with the plaintiffs in error, and therefore said judgment of the Superior Court ought to be reversed.

GATES ET AL. v. NOBLES.

It is no answer to a plea in abatement for the court to say it is overruled.

On a demurrer to evidence, the court ought to determine whether the evidence is sufficient or insufficient.

ERROR to reverse a judgment of the County Court in an action of *assumpsit* Nobles v. Gates et al. for the service of his servant, demanding £8. Plea in abatement — That it was an attachment and neither the person or estate of one of the defendants had been attached. Judgment — Plea overruled.

Defendants plead *nonassumpsit*. Issue to the court. The evidence was, that the defendants jointly agreed to give the plaintiff £8 for the service of his servant; that one of them gave his note for that sum to the plaintiff, which he accepted, and has since sued and recovered judgment upon it, but has got no satisfaction the debtor being a bankrupt — and this action is brought upon the original parol contract against both.

The defendants demurred to the evidence; and the plaintiff joined in the demurrer. The County Court gave judgment that the defendants did assume and promise, and for the plaintiff to recover.

General errors assigned.

Judgment — Manifest error. The court ought to have answered the plea in abatement; to say it is overruled is not any proper answer. The court ought to have answered the question put in issue by the parties, viz. Whether the evidence was sufficient or not. A person's accepting of a written security, for a parol promise from the promisor, extinguishes the parol promise; and the plaintiff having accepted a note from one of the joint promisors, the joint promise by parol was extinguished.

MATSON v. MEACH.

A defendant in an action of trespass, may not depart from his plea of title put in before the justice, and resort to another defense.

ACTION of trespass on land brought before a justice. A plea of title was put in by the defendant, and the cause came by appeal to this court. The defendant moved to alter his plea, to justify as to part and to plead not guilty as to part.

By the COURT. It cannot be done. The defendant must pursue and rely upon his plea of title made before the justice, and may not be permitted to resort to any other defense; for if he fails to make out his title set up in his plea, paramount to the possession or other title of the adverse party; judgment shall be rendered against him for treble damages and cost of suit.

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**MIDDLESEX COUNTY, DECEMBER TERM, A. D. 1791.**

PENFIELD V. NORTON.

**In a prosecution for maintenance of a bastard child, it must appear that the child is born, the mother must be examined upon oath, and nothing is to be given by way of damages for the charges of the child's funeral.**

ERROR to reverse a judgment of the County Court in a prosecution for maintenance of a bastard child, brought by Norton against Penfield — the complaint did not state that the child was born. Penfield was defaulted; and the court proceeded and made up judgment against him, without examining the mother, as to who the father of the child was, that he should pay to the mother three shillings per week for four years, for its support in case it lived, but it appearing to the court that said child was dead they gave judgment that the plaintiff recover £ being the funeral charges of said child and cost.

Errors assigned — 1st. That there was no direct averment in the complaint that the child was ever born. 2d. The mother was not examined touching who the father was. 3d. The child being dead, nothing ought to have been allowed for the funeral charges.

By the COURT. Manifest error. That the child was born, is a necessary averment in a prosecution of this nature, before trial. And as the complaint in such cases is often commenced before the child is born, and the man taken and bound to answer before the County Court upon it, yet the court will continue the cause until the child is born, and then allow the complainant to add that fact by way of supplement to her

complaint. That the mother must be examined touching who the father is, was determined upon a writ of error, at Litchfield August A. D. 1772, in the case of Elisha Truman v. Rachel Sacket.

LEWIS v. NILES.

In an action of slander, evidence that there was such a report before the defendant spoke the words, not admissible. No cause of arrest that some of the words laid, are not actionable.

ACTION of the case for speaking defamatory words of the plaintiff; there were several counts in the declaration for several distinct sets of words.

Plea — Not guilty. Issue to the jury. The jury found the defendant guilty and £9 damages.

The defendant offered evidence upon the trial, to prove, that there was such a report in circulation about the plaintiff, before he spoke the words charged in the declaration; but not admitted; common report not a justification for slander.

The defendant moved in arrest of judgment — That there were several sets of words laid in the declaration, some of which were not actionable, and the verdict is general and goes to all the words laid, and the court cannot know but the damages were assessed by the jury for those words which are not actionable.

Judgment — Motion in arrest insufficient; if there is any set of words laid in the declaration, which are actionable, the plaintiff hath right to recover, and the court will presume the jury have done right in the assessment of damages. Besides upon the whole view of the case it appears that the plaintiff has a good cause of action: further the defendant might have demurred to the insufficient sets of words, and put the question to the court.

ALSOP v. HALL.

Where a mortgage is made defeasible upon paying a sum of money on demand, the mortgagor has no longer time than his life to pay it in.

ACTION of trespass. Plea not guilty. Issue to the jury. The question was upon the title. Abijah Hall, now deceased, on the 9th of December A. D. 1785, mortgaged the land to the plaintiff, by deed of that date, defeasible upon his paying

to her the sum of £181 1s. 10d. lawful money upon demand, with the interest. Said Abijah remained in the possession until March, A. D. 1788, when he died; the defendant being his son and heir, also administrator on his estate, entered upon the land and took the profits and cut the timber.

Plea — Not guilty. Issue to the jury. Verdict for the plaintiff upon the third consideration. The plaintiff's title was the mortgage deed aforesaid. The defendant claimed as heir and administrator to his father Abijah Hall.

By the COURT. The said Abijah could have no longer time than his life to pay the money, upon his death the money not being paid, the title of the plaintiff became absolute at law, and the defendant has no title at law either as heir or administrator to said Abijah.

STEPHEN T. HOSMER, ADMINISTRATOR OF THE ESTATE OF GEN. PARSONS, v. BRATTLE.

**It is the duty of commissioners on insolvent estates, to offset mutual debts between the creditors and the deceased, and to report the balance only, which they find due.**

ERROR to reverse a judgment of the County Court in an action of debt by book, brought by said administrator against said Brattle; to which action said Brattle plead in bar, that upon the death of said Parsons his estate was represented insolvent, and commissioners were appointed to examine and allow the claims of the creditors; that said Parsons was indebted to him at his decease by note, the sum of £40 which he exhibited to said commissioners for allowance; that at the same time he was indebted to said Parsons by book, the sum now in suit; that the commissioners offset said book-debt against said note, and reported only the balance due on said note after deducting said book-debt.

To which a special demurrer was given — 1st. That said commissioners had no right by law to make such offset. 2d. It does not appear, that the commissioners examined the books or that said administrator was present. 3d. Said note

could be contested at common law by the administrator notwithstanding its being allowed by the commissioners, and so *nonconstat*, that anything is due on said note.

Judgment of the County Court — That the plea in bar was sufficient. The same matters were assigned for error which were contained in the special demurrer.

Judgment — That there is nothing erroneous in the judgment complained of. It is the province of the commissioners to offset counterclaims, between the creditors and the deceased, and to report only the balance they find due. The administrator may contest the note at common law, notwithstanding such offset; and if the note is avoided then the remedy will be clear for the plaintiff to recover the book-debt.

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**NEW HAVEN COUNTY, JANUARY TERM, A. D. 1792.**

LAWRENCE v. CLARK.

In an action of *indebitatus assumpsit* for money had and received by the defendant, it is not necessary to say of whom it was received.

INDEBITATUS ASSUMPSIT for money had and received; declaring, that on or about the 13th of December A. D. 1789, the defendant became indebted to the plaintiff in the sum of £193 12s. 6d. money of New York, for so much money had and received for the use of the plaintiff, and to pay over to her, and being so indebted, etc. he assumed and promised, etc. Demurrer to the declaration.

The only exception taken was — That the declaration was too general, in that it did not point out of whom or by whose hands the money was received, whereby the defendant could know how to make defense.

Judgment — That the declaration is sufficient. This is according to the forms of declaring in actions of *indebitatus assumpsit* generally, for money had and received.

ENOS SMITH, ADMINISTRATOR OF ANN CATER, v. NATHANIEL SMITH.

**A sum ordered to be paid to the wife upon her divorce from her husband, is recoverable out of his estate.**

SCIRE FACIAS against said Nathaniel as agent, factor and debtor to William Cater. In this case, the court determined, that a sum of money ordered to be paid to the wife upon a divorce from her husband, was recoverable out of his estate.

BACON & TOMLINSON v. WARNER.

**An obligation assigned is subject to the same equity in the hands of an assignee, as it was in the hands of the promisee.**

PETITION in chancery; showing, that Daniel Grey a bankrupt, assigned to the petitioners an execution in his favor against Joseph Webb of Wethersfield, for the sum of £75 7s. 10d. lawful money debt and cost, dated the 6th of February A. D. 1788, in payment of a debt said Grey owed them; that they delivered said execution to said Warner, constable of said Wethersfield, who received it to levy and collect, and informed him that said execution was assigned to them, and that said Grey was bankrupt; that said Warner collected a part of the money and got security for the remainder, and suffered said execution to run out; whereby he became liable to pay it; that said Webb and said Warner contrived together to defraud the petitioners of said debt, procured a discharge of said execution from said Grey, whereby the petitioners are defeated of their remedy at law against said Warner, and said Webb is insolvent: Praying that said Warner may be compelled to pay said execution to them, etc.

To which petition said Warner made the following answer, viz. he admitted that he received said execution to collect; that he collected £32 upon said execution and paid it to the petitioners; that there was no assignment written upon said execution; that he knew of none except by the verbal information of Samuel Thatcher, who delivered him said execution. That the note on which said execution was recovered was given for the balance upon a settlement of accounts, between

said Grey and Webb; in which settlement there was a mistake, which was discovered, and said Grey had given said Webb a writing engaging to rectify it, by indorsing the sum upon said note, long before said execution was assigned to the petitioners; that said Webb, without the knowledge or privity of the respondent, in pursuance of said agreement applied to said Grey and obtained said discharge, it being for the amount of said mistake and no more; and of which the respondent had no knowledge, until five days after it was done; and that he never did collect any money on said execution, except said £32, which he paid to the petitioners. To this answer the petitioners demurred.

Judgment of the court — That the answer is sufficient, and that the petitioners take nothing by their petition.

First, because said debt was subject to the same equity in the hands of the assignees, the petitioners, as it was in the hands of Grey. This is a settled principle in equity; except, in favor of commerce, the case of bills of exchange and negotiable notes.

Secondly, Warner being an officer, is not liable to the petitioners in equity for money which he had not collected, on the ground of a nonfeasance, from which he was legally and fairly discharged without any fraud in him.

## Turner v. Tuttle.

**The seller of a public security runs the risk of its being true and genuine, especially if he affirms it to be such.**

Action of the case, declaring, that on the day of A. D. 17 the defendant was possessed of a certain note signed with the name of Timothy Pickering, and countersigned by Tyson, dated the 7th of June, A. D. 1781, for $180; which note, the defendant put off and passed to the plaintiff as and for a good note issued by said Pickering under the authority of the United States. And to induce the plaintiff to buy it, affirmed that it was a good Pickering note, and equal in value to final settlement notes; and that it was receivable at the office of the auditor of the United States:

That the plaintiff relying upon the affirmation of the defendant purchased said note, and gave £50 for it. When in fact said note was not issued by said Pickering under the authority of the United States, and is not receivable at said auditor's office, nor any other in the United States; and is worth nothing, all which the defendant knew, and the plaintiff was ignorant of at the sale aforesaid.

Plea — Not guilty. Issue to the jury. Verdict that the defendant is guilty, and for the plaintiff to recover.

Motion in arrest — That the plaintiff's declaration is insufficient, upon the ground, that this is a public security, and whether it was genuine or not, was equally in the knowledge of the plaintiff as of the defendant; and by going to the officers of the treasury it might have been known whether it was true or not, and this the plaintiff had in his power to do.

Judgment — Motion insufficient, and for the plaintiff to recover. The value of public securities is considered as a matter of public notoriety, equally in the knowledge of the buyer as the seller; but the genuineness of them is not so, nor could it be found out in this case, without much time, pains and cost; the seller in such cases takes the risk upon himself and is responsible.

### Fitch, Sheriff, v. Scot & Upson.

**The court will give judgment for the plaintiff notwithstanding the verdict is for the defendant, if upon the whole record, it appears the right of the case is with the plaintiff.**

Action on bond, conditioned, that said Scot, who was in prison upon an execution in favor of Samuel Wales, for £32 18s. 10d. lawful money, should abide a true and faithful prisoner; alleging a breach, that he made his escape from prison on the 11th of November inst. per writ dated 18th of November A. D. 1791.

Plea in bar — That on the 23d day of June, A. D. 1791, between half an hour after four o'clock, and half an hour after five o'clock in the afternoon, said Scot took the oath provided by law for poor prisoners; that the creditor furnished money for his support for twenty weeks from that time, and no more; that said twenty weeks expired on the

10 of November after, between half an hour after four o'clock, and half after five in the afternoon; that said Scot remained a faithful prisoner until twenty minutes after six o'clock in the afternoon of said day, and supped at his own expense; and there being no more money left with said gaoler or said Scot for his support, he went out of prison as well he might.

The plaintiff replied — That said oath was administered between twenty minutes after six and seven o'clock in the afternoon of said 23d of June; and that money was furnished regularly for said Scot's support for twenty weeks, and until twenty minutes after six o'clock in the afternoon of said 10th, and at twenty minutes after six o'clock in the afternoon of said 10th of November the creditor left with said gaoler six shillings for the support of said Scot, the week then next ensuing. And said Scot made his escape between six and eight o'clock in the morning of the 11th of November aforesaid; and that he ought not to be barred without that, that said oath was administered to said Scot, between half after four and half after five o'clock, in the afternoon of said 23d of June.

The defendants accepted the traverse, and issue was joined to the jury; and the jury found that said oath was administered between half after four, and half after five o'clock in the afternoon of said 23d of June, and found for the defendants their cost. Upon which the plaintiff exhibited a motion for judgment in his favor, upon the ground that by the pleadings and the whole record taken together the plaintiff was entitled to judgment, the verdict notwithstanding.

By the Court. Judgment for the plaintiff; for it appears by the plea in bar, that said Scot went out of prison, at twenty minutes after six o'clock in the afternoon of said 10th, which was too soon, the money left being expended not two hours before; immediately upon which more money was left. If he remained in until the next morning and then went out, it was after the six shillings was left, and clearly an escape: And it is the duty of the court to give judgment according to law upon the whole record. See Sheriff Fitch v. Cook, etc. New Haven, last circuit.

AUSTIN v. FITCH, AS GAOLER.

**Where two issues in one action are joined, one special and the other general, to different parts of the declaration, and both tried by the jury at the same time, and on motion in arrest, the verdict is set aside as to one, it doth not affect the verdict as to the other.**

ACTION for the escape of Richard Spelman imprisoned on two executions in favor of the plaintiff; the escape upon both is laid to have been at the same time. A special plea was made in bar of one, and not guilty plead as to the other. Both the issues were tried by the jury, who found the special issue in favor of the plaintiff, and the general issue in favor of the defendant.

The plaintiff moved in arrest of judgment upon the special issue found against him, on the ground of its being immaterial; and the court judged the motion to be sufficient, and ordered a repleader last circuit.

The court now determined — That the repleader extends only to the special issue.

FOWLER v. SPELMAN.

**Upon a *scire facias* against a garnishee, the court permitted the defendant to show mistakes or other equitable considerations which evince that in justice he owes nothing to his principal.**

SCIRE FACIAS against her as factor and debtor to Richard Spelman, an absconding debtor. Plea — That she was not nor is factor or debtor to said Richard.

It appeared that upon a settlement made between the defendant and her son Richard some years since, a balance was found due to him of £300 for which she gave her note to said Richard, and they executed mutual discharges to each other. Now she moves to be permitted to show that there were mistakes in the settlement she made with her son, over the head of said discharges, more than to the amount of said note, and thereby evince that she was not his debtor, which was strongly objected against by the plaintiff, but was granted by the court. And upon a full investigation of the matters the court found that there were mistakes made in said settlement against the defendant to the amount of a greater sum than her said note was given for, and that in equity and good

conscience she owed said Richard nothing, and accordingly found that she was not factor nor debtor to the said Richard, and that she recover her cost.

Actions of this nature and the inquiries upon them have been considered and treated much in the same manner as suits in chancery. And the creditor is entitled to recover out of the garnishee only what in equity and good conscience the absconding debtor is entitled to have and recover.

COLLINS v. HUBBARD.

**The value of public securities are to be estimated at the time when payable, if no time is set, then they are due presently and that is the time to estimate them.**

ACTION upon a note dated the 16th of March A. D. 1790 for £142 14s. state securities payable in coin on demand. Plea of full payment. Issue to the jury.

The sole question was — What ought to be the rule by which to assess the damages; whether the value of the securities at the time of the contract — or at the time of commencing the suit, as no demand was made previous to that — or at the time of rendering the judgment.

By the COURT. The value of securities is to be taken at the time when they are made payable, if any time is given for payment — but where no time is given, they are due presently; in that case the value is to be estimated at the time of the contract and the jury found accordingly upon second consideration.

BRUNSON v. LYNDE.

**In an action of defamation where the plaintiff sets up his character to be good, to the point of damages his general character with respect to the crimes he was charged with, may be inquired of.**

ACTION of defamation, for saying that the plaintiff had perjured himself in a certain cause before an arbitration. Issue to the jury.

Question put to the court — Whether evidence may be introduced with respect to the plaintiff's general character?

By the COURT. Such evidence is admissible, as the plaintiff has directly set up his character to be good, and which will go to the point of damages.

HOTCHKISH'S PETITION.

**In petitions for divorce the same notice is to be given as in other cases, where it can be done.**

PETITION for divorce. Question — Whether twelve days' notice was necessary, as required by the law in other cases.

By the COURT. Cases of this nature are within the reason of the law with respect to notice, where it can be done.

DURAND v. CARRINGTON.

**A second action for the same cause is not abated by the pendency of the first, where the first was defective and the second necessary for security or for a recovery.**

ACTION on note by attachment. Plea in abatement — That the plaintiff commenced another action by attachment prayed out and served previous to the present writ, for the same cause, matter and thing.

Reply — That said first attachment was not legally served so as to hold the estate taken thereby; and the plaintiff discovering said defect, prayed out the present writ of attachment, to secure his debt and that he did not answer in or pursue said first action. Demurrer.

Judgment — Reply sufficient — for that the second writ is not for vexation; but to secure the plaintiff's debt.

GILLET v. BRISTOW.

**In a reply to a plea of no award, to an action upon an arbitration note, it is necessary to set forth not only the award, but a breach on the part of the defendant.**

ERROR to reverse a judgment of the County Court in an action upon a note, Bristow v. Gillet. Plea — That it is an arbitration note, and that said arbitrators never made any good and legal award.

The plaintiff replied the submission and award and set them forth, but did not allege that the defendant had not performed it. Demurrer. Judgment — Reply sufficient.

Error assigned — That the plaintiff had not alleged a breach on the part of the defendant.

Judgment — Manifest error — for it is necessary that the plaintiff in such case, not only reply a good award, but also allege a breach on the part of the defendant.

TREAT v. CARRINGTON.

An indifferent person to whom a writ is directed to serve, may give bond for prosecution.

The value of public securities payable on demand, set at the time of the contract.

ACTION on note dated October A. D. 1790, for £304 3s. 5d., payable in state securities on demand, by writ of attachment, directed to Joseph Platt, jr. an indifferent person to serve and return, etc. on which writ of attachment said Platt gave bond for the plaintiff, and served said writ. Plea in abatement — That said Platt gave bond on said attachment and so not an indifferent person. Demurrer.

Judgment — That the plea is insufficient. See Curtice v. Scovel, New London September 1790. The case was afterwards defaulted and damages given for the value of the securities, at the time of the contract, as the note was payable on demand.

MARY WILLIAMS, ADMINISTRATRIX ON THE ESTATE OF NATHAN WHITING, DECEASED, v. THE EXECUTORS OF THOMAS DARLING, DECEASED.

It is the duty of commissioners on an insolvent estate, to offset the mutual claims of the creditors and the deceased.

No appeal lies from the report of commissioners, by a creditor, because his claim is not allowed.

APPEAL from an order of the Court of Probate, accepting a return of commissioners on the estate of said Thomas deceased, which was represented insolvent, for the following reasons, viz. that said Mary recovered a judgment against the said Thomas in his lifetime, for £ which being in force and unpaid, she exhibited it to said commissioners, and claimed to have it allowed: And the executors of said Darling brought in a sum paid to Haly, etc. by the said Thomas for the use and benefit of said Nathan, to the amount of said judgment, and claimed to have it offset; which said commissioners did, and made report without finding anything due to the estate of said Nathan; which said commissioners had no authority to do. Hosmer v. Brattle, Middlesex, this circuit.

Plea in abatement — That no appeal lies in such case, for the reasons stated by the appellant; for the appeal is from the doings of the commissioners, whom the law has made the final judges in such cases.

Judgment of the court — That the plea in abatement is sufficient; for that by the law the commissioners are the final judges with respect to the claims of the creditors, where they are disallowed, and they have right to make offsets in such cases.

ATWATER v. CARRINGTON.

Value of public securities set at the time of the contract.

ACTION on a receipt for $1575 70-90 loan office certificates; said receipt dated 3d of September A. D. 1790, in which the defendant promised to return said certificates or others in lieu, with interest. Defaulted.

Damages — The value at the date of the receipt, which was eleven shillings six pence on the pound.

TREAT v. CARRINGTON.

Value of public securities set at the time of the contract.

ACTION on note, dated in October 1790, for a sum in state securities, payable on demand. Defaulted.

Damages — The value at the date of the note, which was eight shillings three pence on the pound.

MURRAY ET AL. v. BISHOP, COUNTY TREASURER, ET AL.

Special damages given for an escape through the insufficiency of the goal.

ACTION for the escape of Richard Spelman, who was in prison upon an execution for £240, and made his escape through the insufficiency of the gaol. Defaulted. Special damages only given.

SMITH v. COUNTY TREASURER, ET AL.

Special damages given for an escape through the insufficiency of the gaol.

COMPLAINING, that he attached Richard Spelman, on a note by which he was committed to gaol, and made his escape

through the insufficiency of the gaol; that he recovered judgment on said note before the County Court, in March, A. D. 1789, for £103 18s. 1d. York money debt, and cost £3 10s. 9d. lawful money, and had execution for said sum, which has been returned *non est inventus;* and demands judgment for his damages and cost.

On a hearing the court found that said Spelman made his escape through the insufficiency of the gaol, and gave judgment for £20, the special damages only, and £12 3s. 7d. lawful money cost.

DAVIDSON v. FOWLER.

**An ancient grant of a privilege to erect a mill and dam upon a stream of water, without limitation, as to height must have a reasonable construction, and the practical understanding of the grantees ought to conclude them.**

ACTION for a nuisance; declaring, that the defendant is owner of a certain grist-mill and dam, standing upon a stream or river in Milford, about forty rods below the mill of the plaintiff's; and that the defendant hath lately raised his dam about thirteen inches higher than he had right to do, by means whereof the water sets back upon the plaintiff's water wheel, and prevents his grinding, etc.

Plea — Not guilty. Issue to the jury.

The facts were as follows — In A. D. 1639 the town of Milford granted to William and Jonathan Fowler, liberty to erect a grist-mill on said stream at the place where the defendant now hath a mill; also to raise a dam so high as should be necessary for grinding meal, flour, etc. that they accordingly built a mill, and raised a dam to a certain height; said mill afterwards came to John and Nathan Fowler, as tenants in common, and said mill and dam was improved in that place about 150 years, in which time said dam was repeatedly rebuilt, but never so as to flow the water back to the plaintiff's mill place by several rods.

In A. D. 1674, the town of Milford granted liberty to William Fowler, to erect a fulling-mill and a saw-mill, at the island above, on the same stream. In A. D. 1702, said town

requested the proprietors of the saw-mill and fulling-mill to build a grist-mill near the saw-mill. In A. D. 1783, John Fowler bought the saw-mill and fulling-mill, being also part owner of the lower mill, and built a grist-mill, about forty yards lower down the stream than the saw-mill; and laid the bottom of the flume to the grist-mill four feet lower than the saw-mill; where the water had then never flowed back, by means of the dam at the lower mill; said John Fowler sold his right to the lower mill in A. D. 1784, and afterwards died; and the plaintiff purchased said upper mill in 1789; that about three years ago the defendant erected three other mills below, and raised the dam about thirteen inches higher than it had ever been raised before, which caused the water to set back upon the wheel of the plaintiff's grist-mill.

The jury found a verdict for the plaintiff, and £10 damages. The court accepted the verdict, upon the principle that as the original grant to William and Jonathan Fowler, with liberty to raise a dam for the use of said mill without any limitation, as to height; the grant is to receive such a construction, as reason and the practice of the grantees have given it. The privilege originally granted was to build one mill, and the old dam raises a sufficient head of water for that. The proprietors for 150 years, have announced to the world by their practice, what they understood to be the height of the dam, and it would be taking advantage of their own wrong now to raise their dam, contrary to so long a practice to the prejudice of those who had purchased and expended their money upon said stream above. The grant must have a reasonable construction, and had there been a doubt about it at first, 150 years' practice by the grantees and those under them has removed it.

ADAMS and CHAUNCEY, JJ., dissented from the verdict; upon the idea that the original grant gave an unlimited right to the original grantees to raise the dam to accommodate their mills.

FAIRFIELD COUNTY, JANUARY TERM, A. D. 1792.

HILLYARD v. NICHOLS.

A court of chancery will go, over the head of an award to relieve against a fraud, which defeats all benefit from the award.

PETITION in chancery; complaining, among a variety of other matters and things, that he purchased a certain bond of Daniel Pendleton, which said Nichols gave him; therein acknowledging that he had received nine Virginia land warrants, of 1,000 acres each, to survey and locate in Virginia; also £25 13s. in money, to pay the fees and expenses; and therein said Nichols bound himself to have said warrants located and surveyed, and to bring to said Pendleton a certificate thereof from the land office, or to return said warrants; about which a dispute arose between the petitioner and said Nichols; which they submitted to arbitration, that said Nichols testified before said arbitration that said land warrants were ready for said Pendleton or his order, at the land office in Virginia; and that he had expended all the money he received of said Pendleton in his service except £9 which he had ready for him.

Upon which said arbitrators awarded the petitioner to deliver up to said Nichols his bond that he bought of said Pendleton, which he accordingly did; and that the said Nichols about the time of said submission and award, and wholly unknown to the petitioner, sent his son Austin to one Wood who held the land office in Virginia, and with whom said Nichols had left said land warrants unlocated, and to whom he had agreed to give forty-eight shillings per right over the legal fees; and authorized and directed him to make an assignment of said rights in Pendleton's name, so as to prevent the petitioner from ever having any benefit from them; which was accordingly done, and the petitioner has lost all benefit of said land warrants, by the fraudulent procurement of said Nichols, and praying for a remedy in the premises.

A plea in abatement was made and heard in January A. D. 1791, and judgment that said petition abate as to all the matters set forth except two. The claim for the land war-

rants bought of Pendleton was one. For the fraud complained of as to them was not submitted, nor considered by said arbitrators, but was practiced to defeat the petitioner of the benefit of said award, and as said bond was delivered up the petitioner had not an adequate remedy at law.

Upon hearing the petition on the merits, the court decreed that said Nichols pay the petitioner the sum of £ lawful money, the value of said land warrants and the cost. The other matter excepted out of the abatement, was also heard upon the merits, and found not to be supported.

NICHOLS v. SHERMAN & FOOT.

**Daughters' husbands, not liable to the support of their wives' parents.**

THIS cause was entered in this court, upon a reversal of the judgment of the County Court, upon an application to the County Court; showing that one old Mr. Hird was become impotent and poor and unable to support himself, and that said Sherman and Foot's wives were the daughters of said Hird, and of ability to contribute towards his support; and praying that Sherman and Foot may be compelled to make contribution for his support.

Plea in abatement — That their wives never received anything from the estate of their said father Hird, and that they are only sons by marriage, and are not liable by law to contribute to the support of said Hird.

Judgment — Plea sufficient; as a point which has been long settled. Kirby's Rep. 155, Mack v. Parsons et al. See Sherman et al. v. Nichols, Fairfield January Term, A. D. 1791.

BRADLEY v. COUCH.

**In an action upon the statute for a counterfeit certificate the plaintiff can testify only to the identity of the certificate and of whom he received it.**

**The value set at the time of passing it.**

ACTION upon the statute for uttering and passing to the plaintiff a final settlement note, in August A. D. 1789, which had the signature of John Pierce commissioner, as and for a good certificate; and the plaintiff says that said certificate *is* false, forged, counterfeit and altered, and never was issued

from under the authority of the United States, nor signed by John Pierce commissioner; and said false, forged and counterfeit certificate is in the words following, viz. (recites the certificate) which is contrary to the statute, etc. Demanding damages. To this declaration a demurrer was given.

The exception was — That it was not averred that said certificate was false and forged, at the time when it was uttered and put off to the plaintiff; but only that it was false, at the time of declaring.

Judgment — Declaration sufficient. The plaintiff is describing the certificate, which was passed to him, and says it is a false, forged, etc. and then says it was never issued under the authority of the United States, nor signed by John Pierce, etc.

The plaintiff was examined upon oath according to the statute, touching the defendants passing said certificate to him, and confined to that only, in his testimony. And the court assessed the damages according to the value of the certificate at the time it was passed to the plaintiff, which was six shillings on the pound.

## Burrows v. Pixley.

**Where a common nuisance, is a particular injury to any one more than to the rest of the citizens in general, he may have an action for it.**

Action of the case for a nuisance; declaring, that Poquanock river is a large navigable river, or arm of the sea, for four miles northward to where the post road crosses the same, and to the plaintiff's dwelling-house and farm in said Stratford, where the plaintiff now and for more than thirty years last passed hath dwelt; which forms a peninsula, around which the two branches, constituting said river meet, where the plaintiff now and for more than thirty years last passed, hath had and owned a store conveniently situated for vessels and boats to pass to and from, up and down said river loaded; in which large quantities of the produce of the state, also goods and merchandise, have usually been deposited for the purpose of transportation by water by the plaintiff, by means

of the navigableness of said river to his great emolument; that he is concerned in the coasting business through said river to Boston, New York, and elsewhere; that he is a farmer and raises large quantities of produce on his farm for exportation by said river; that he has been at much expense in providing boats for the purpose of fishing, oystering, and clamming, and hath derived much profit thereby. That he hath for many years last passed and still owns a ship-yard on his said farm, where he carries on the business of ship-building; by all which ways the plaintiff hath derived much profit to himself, through the navigableness of said river: All which he possessed and enjoyed until on or about the 10th day of October A. D. 1783, when the defendant to injure and deprive the plaintiff of the many and great advantages derived from the navigation of said river aforesaid, erected a dam across said river about three-quarters of a mile below the plaintiff's said house, farm, store, ship-yard, etc. at the narrows, to the height of about five feet above low-water mark in said river; which effectually obstructs all vessels and boats passing up and down said river, to and from the plaintiff's said house, farm, store, and ship-yard, through the narrows aforesaid; and ever since hath continued said dam across said river to the nuisance and great detriment of the plaintiff in his trade, navigation and husbandry. Damage £300. Demurrer to the declaration.

Exception — That the declaration is too general — which amounts to no more than a common nuisance; for which every citizen might have an action as well as the plaintiff; that the declaration does not allege any particular injury he has suffered; that any vessel of his or of any other person has been hindered coming up or going down said river, or the like, which is necessary in order to his supporting an action, etc.

Judgment — That the declaration is sufficient. Although an obstruction formed across a navigable river or a highway, is a common nuisance to all the citizens who have occasion to pass that way; yet if any one receives a particular injury thereby he may have his action.

The plaintiff in this case sets forth certain private rights and advantages, which he hath and for many years passed hath been possessed of and enjoyed through the open navigation of said river, which he is wholly deprived of by means of erecting said dam across said river, which were a great source of profit to him, in his store, ship-yard, and navigation; which are not common to all the citizens: Further, it would be absurd to say that where a man's door is obstructed by an impassable ditch, that he must cause some of his family to attempt to pass it and break their bones before he can have an action for the injury, the very forming the ditch, although in the public highway is as to him a private injury.

STRONG ET AL. v. M'DONALD.

**Chancery will not interpose, where the party has adequate remedy at law.**

PETITION in chancery; showing, that they executed a certain bond to said M'Donald for £1,000, dated the 29 day of May, A. D. 1790, conditioned, that said Strong should perform certain things within eighteen months, which were set forth particularly; and that he had performed them within said eighteen months; and pray that said M'Donald be compelled to deliver up said bond to be canceled. Petition dated the 19th of November A. D. 1791.

Plea in abatement — 1st. That the said Strong and said M'Donald were both inhabitants of the state of New York. 2d. That said eighteen months had not elapsed from the date of said bond, at the time of bringing this petition. 3d. That the petitionee immediately, upon the expiration of said eighteen months, instituted a suit upon said bond against said Strong before a court of competent jurisdiction in the state of New York; where said cause was now depending in the law, and where the petitioners had adequate remedy at law, by showing that said Strong had performed the condition of said bond.

Judgment — That the plea in abatement is sufficient, and that the petitioners take nothing by their petition.

FERRISS v. FERRISS.

**The action of trover may be sustained in certain cases, where an action of trespass would have lain, and is not barred by the Statute of Limitation.**

ACTION of trover for a horse, ox, and heifer, which were lost in A. D. 1779, and by finding had come into the hands of the defendant, and by him converted in January A. D. 1787, to his own use; per writ dated the 2d of April, A. D. 1790.

Plea in bar — That on the 14th of July, in A. D. 1779, the defendant with others, with force and arms broke and entered the plaintiff's close, and took and carried away said horse, ox and heifer, mentioned in the plaintiff's declaration, and did dispose of them to his own use; that the taking of said creatures was by force and arms and is the same finding and converting mentioned in the plaintiff's declaration, and is more than three years from the date and impetration of the plaintiff's writ; and by the Statute of Limitation, respecting actions of trespass the plaintiff is barred. And as to any other conversion of said horse, ox and heifer, the defendant says he is not guilty. The plaintiff demurred to the defendant's plea in bar.

Judgment — That the plea in bar is insufficient. There are certain cases in which trover is the proper action; there are others in which the action of trespass is the proper remedy; there are others in which either trover or trespass may be brought indifferently; and a recovery in one will be a bar to the other, which is this case. All this was open to the legislature, when they enacted a limitation to actions of trespass, and left the action of trover unrestrained; and this court cannot alter the law.

FITCH v. BURR.

**A bond for the prosecution of an action, not within the Statute of Limitation respecting bail.**

ACTION of debt on bond for £20, given for prosecution at praying out a certain writ in favor of Nathaniel Cary of Boston, against said Hezekiah Fitch; dated 22d of October A. D. 1787, returnable to the County Court to be holden at Fairfield, on the third Tuesday of November A. D. 1787.

And that before the adjourned County Court holden at Danbury, in January A. D. 1789, said Fitch recovered judgment against said Cary, for £5 10s. lawful money, for cost of suit; whereby said Cary failed to prosecute his said action to effect, etc. and took out execution dated the 20th of January A. D. 1789, which has been duly returned *non est inventus*, neither said judgment, execution or bond, hath ever been paid, etc. per writ dated 31st of March, A. D. 1790.

Plea in bar — That the plaintiff's writ was granted 31st of March, A. D. 1790, and served on the 7th of April following; that the date and impetration of the plaintiff's writ, was more than one year after said judgment mentioned in the declaration; and by virtue of a law entitled an act concerning bail, the plaintiff is barred of any recovery on said bond. Demurrer.

Judgment — Plea insufficient, and for the plaintiff to recover; for a bond for prosecution given at praying out of a writ, is not within said Statute of Limitation respecting bail.

BEARDSLY ET AL. v. HALLS ET AL.

**Chancery will administer complete redress to the parties.**

PETITION in chancery; showing, that on the 1st of May, A. D. 1776, they sold the petitionees about thirty acres of land, and described it, and gave a bond to procure a title to said land by the 1st of April, A. D. 1778, the title being in Theophilus Beach of New York; that said Halls gave them their note for £51 3s. 9d. the purchase money, payable on the 1st of January A. D. 1778, with the interest; that said Halls entered immediately into the possession of said land, and have had the improvement thereof ever since; and by reason of the war they have been prevented getting a deed from said Beach; he having been in the enemy's lines, until since the war; that said Halls have sued your petitioners on said bond, which is depending in this court, and your petitioners have sued said Halls on said note, which is depending in the County Court; and that on the 3d of September A. D. 1790, they tendered to said Halls a good deed of said land which they refused to accept; and now offer and tender the same in court, and pray said Halls may be compelled to receive it; and that the petitioners be relieved against the penalty of their said bond.

The court heard the petition upon the merits, and ordered and decreed that the petitioners should cause to be made and delivered to the clerk of the court by the 1st of February next, a good authentic deed of said land, for the use of the respondents, and pay the cost of the action on said bond, or pay to the petitionees the sum of £300 lawful money; that the petitionees discontinue their action on said bond and deliver it to the clerk of the court, by the 1st of February 1792, or pay to the petitioners the sum of £300; that the petitioners recover on said note £99 9s. 7d., also £5 for the cost in said action; and that the petitioners discontinue their action on said note, or pay £300, and that upon the petitioners lodging said note with the clerk of this court, he grant execution for said debt and cost.

### Payne v. Payne.

**A defendant cannot introduce himself a witness on a bill filed upon the statute, against a note.**

**A defendant may withdraw his bill, and plead the statute.**

Action on note. The defendant filed his bill against the note, on the statute, complaining that it was usurious and oppressive, and moved to be admitted to his oath to prove his bill.

By the Court. This cannot be allowed; for according to the rules of chancery, a man cannot introduce himself to be a witness in his own favor. The plaintiff in his answer to the bill, might appeal to the defendant's conscience and so have him introduced. See Livingston v. Bird, Litchfield August 1791.

The defendant then moved for liberty to withdraw his bill and plead the statute in avoidance of the whole note; which was allowed by the court.

### Gregory v. Seamons et al.

**Where relief is asked for against the mistakes of arbitrators, in an award, a court of chancery will rectify them, if it can be done, without setting aside the award.**

Petition in chancery, alleging that on the 20th day of February A. D. 1782, the petitioner with William Malthee

Betts, of Norwalk in the county of Fairfield, and Walter Seamons, Titus Conklin, Benjamin Wood, Benjamin Titus, Timothy Titus, Ebenezer S. Platt, all now of the state of New York, and Samuel Allin of the state of Vermont; purchased for their joint benefit of Elijah Abel, Esq. the sloop Shuldum, at the price of £766 13s. 4d. money of New York, for which they gave their note on said 20th of February A. D. 1782 to the treasurer of the county of Fairfield, payable with interest; that said sloop was afterwards, by direction of said owners, employed in trade; that the petitioner was appointed agent or ship's husband.

That the petitioner at the time of executing the aforesaid note, gave his note for the benefit of said company to said treasurer for £8 16s. York money, payable with interest, being part of said purchase money; that the petitioner afterwards made large disbursements, and also received of said sloop's earnings to a considerable amount as agent aforesaid, also received from said owners sundry sums of money to pay said notes and his disbursements aforesaid; that the petitioner not being able to make full payment of said notes, the first mentioned note was put in suit against the petitioner before the County Court in Fairfield county, and judgment recovered thereon against him; that afterwards said note was put in suit against said Seamons and Timothy Titus in the state of New York, and judgment recovered against them before the Supreme Court in that state, with a large bill of cost; that said Walter Seamons and Timothy Titus filed their bill in chancery, merely for delay and vexation, against the treasurer of the county of Fairfield, who was plaintiff in said suit; that the cost in the suit before the Supreme Court amounted to £84 14s. York money, which said Seamons and Titus subjected themselves to pay unnecessarily, and in their needless suit in chancery to the further sum of £132 17s. 8d., amounting in the whole to £217 11s. 8d. York money, which was completely wasted and lost, there being no reason for incurring it, and said Seamons and Titus have been obliged

to pay to said treasurer the sum of £296 7s. 5¾d. York money, and also the sum of £84 14s. the cost recovered in the Supreme Court aforesaid.

This being the state of their affairs on the 7th of March A. D. 1787, and the whole concerns of said partnership relative to said sloop and her voyages being unsettled, said Seamons, Titus, Conklin and the petitioner in behalf of themselves, and Isaac Norton then of New York, now deceased, in behalf of Benjamin Wood, Benjamin Titus and Timothy Titus, and in virtue of authority from them, did agree to submit to the final award of Thomas Fitch, Esq. and Ebenezer Phillips, arbitrators mutually chosen by and between the petitioner on the one part and said Seamons, etc. on the other part, and did enter into a written submission of all matters, disputes, claims, judgments, costs, accounts and controversies, relative to the purchase and pay for the sloop Shuldum, her earnings, voyages and the petitioner's account for receipts and disbursements as agent and every other matter relating to said affair and business; and the parties executed to each other their notes in the sum of £500 to abide said award, etc. and in case the arbitrators do not agree they were to choose a third man, etc. which submission is set forth and signed by the parties — in which is included all the partners except William M. Betts.

That said arbitrators made out an account or statement of debt and credit between said parties, by which they found and awarded the petitioner to pay said Seamons, etc. the sum of £414 money of New York and indorsed your petitioner's note to said sum and delivered it to said Seamons, etc. that said note had been sued, judgment and execution recovered upon it for the full sum, and said execution had been satisfied by the petitioner's land being levied upon and appraised off on the 22d of November A. D. 1790; that said arbitrators in making out the sum of their award made sundry mistakes upon their own principles and had charged him with interest and cost contrary to what they intended and meant, and contrary to the express agreement of the parties, and particularly

points out wherein; further alleging that said arbitrators were convinced of their said mistakes, etc.

Plea in abatement — That the petition contains no sufficient grounds for a court of chancery to interpose. Plea judged insufficient.

The court heard the petition on the merits. The arbitrators were admitted and testified with respect to the mistakes in point of fact. The court found that said arbitrators had made mistakes in four articles, amounting in the whole to £132 12s. 5d. York money, being £99 9s. 3¾d. lawful money, and ordered and decreed that the petitionees should reconvey to the petitioner by a good authentic deed, so much of the land set off to them in satisfaction of said execution, at the appraisal of Messrs. William St. John, etc. appraisers of the land on said execution, to be estimated according to the same rule it was appraised by them before for quantity and quality; said deed to be executed and delivered to the town clerk of Norwalk by the first of next June, etc. for the use and benefit of the petitioner under a penalty.

The court instead of setting aside said award and the subsequent judgment and execution, decreed a rectification of the mistakes, and let the award remain good for the residue, which must be a great saving of expense to the parties.

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**LITCHFIELD COUNTY, JANUARY TERM, A. D. 1792.**

BACON v. PORTER.

**Notes given for land and a bond only taken for a deed, when said notes shall be paid, are valid and good.**

ACTION on note dated the 14th of August 1783, for £60 payable in thirty-six months with the interest annually.

Plea in bar — That at the date of the note on which, etc. the defendant and one Peck agreed to purchase of the plain-

tiff about eighty acres of land, at the price of £360 lawful money, for which the defendant and said Peck gave their joint notes, as follows, viz. one for £60 payable in two years with interest, one for £60 payable in three years with interest, one do. payable in four years with interest, one do. payable in five years with interest, one do. payable in six years with interest, one do. payable in seven years with interest, and the plaintiff received said notes in payment for said land, and gave his bond for £1000, conditioned to give a deed of said land to the defendant and said Peck, upon their paying the aforesaid notes by the times therein specified, and upon their failing to make the payments aforesaid, by the times therein specified, said bond to be void; and the defendant and said Peck then entered into the possession of said land, and have used and improved it ever since as their own; one of which notes is the note now in suit, which notes and bond contain the whole agreement between said parties respecting the purchase of said land; and the defendant and said Peck's entering and improving said land as aforesaid, is the only consideration for giving and executing the note on which, etc. by which contract it was at the election of the defendant and said Peck to pay said notes and entitle themselves to a deed of said land or the forfeiture of said bond, or to neglect to pay said notes and render void said contract and agreement. The plaintiff demurred to the plea in bar.

Judgment — That the plea in bar is insufficient and for the plaintiff to recover.

By the Court. The case is not different from what it would have been, had Bacon given a deed of said land to Porter and Peck, and they had given back a deed to Bacon and taken his bond, conditioned to reconvey said land to them upon their paying said notes, which is common practice, and been sanctioned by the courts without an exception. For if they paid the notes, although not punctually by the time, chancery would decree a conveyance of said land to them

by force of the agreement contained in the condition of the bond.

This judgment was affirmed in the Supreme Court of Errors.

### Hurd v. Hall.

**In an action of *indebitatus assumpsit*, the plaintiff's mentioning in his declaration of whom the money was received, for which the defendant was indebted, does not vitiate the declaration.**

Action of *indebitatus assumpsit*, declaring that on the 1st of February A. D. 1786 the defendant was indebted to the plaintiff £45 for money before that time had and received for the plaintiff's use, viz. moneys received of Ard Welton, which was in part pay for a farm sold to said Welton in October A. D. 1785 and being so indebted, etc. assumed and promised, etc. Demurrer to the declaration.

The exception was — That the defendant's receiving the money of Welton, did not create an indebtedness to the plaintiff, without a special request to pay it, and a refusal or a misapplication of the money.

Judgment — That the declaration is sufficient. The averment is direct and positive that the defendant was indebted for money had and received for the plaintiff's use, which is all that was necessary. See Lawrence v. Clark, New Haven this circuit, and the plaintiff's mentioning of whom the money was received is for the defendant's advantage.

### Smith v. Canfield.

**Interest on the debt, suspended by an *audita querela*, is not recoverable on the bond given for prosecution of the *audita*, etc.**

Action of debt on a bond of recognizance, entered into before Daniel Sherman, Esq. chief judge of the County Court, upon an *audita querela*, taken out by Timothy St. John against said Smith; praying to be relieved against three executions. In which *audita querela* judgment was against said St. John, and for said Smith to recover cost £10 6s. 9d.

Plea in bar — That said St. John had paid all said executions to Sheriff Lord, and had also paid the cost recovered on said *audita querela*.

The plaintiff replied and admitted said executions and cost on said *audita* to have been paid, but says the interest on said execution during the time said executions were delayed by said writ of *audita* had not been paid. Demurrer.

Judgment — That the plaintiff's reply is insufficient; upon the principle that a bond upon a writ of error and on an *audita querela*, does not extend to the interest on the debt, for the time payment is delayed thereby. See Lane v. Breed, New London September 1790.

JOHNSON, SHERIFF, v. SMITH.

**If the principal's body is taken by the execution the sheriff's bail is discharged.**

**If a repleader is ordered upon a motion in arrest, full cost is taxed on the final issue of the cause.**

ACTION on a bail bond, conditioned that Jeffe Goodwin and Plumb, who were attached at the suit of Wycoff, should appear and answer said suit, etc. declaring that said Goodwin and Plumb did not they nor either of them appear and answer in said suit, and judgment was against them upon default for , and that execution was taken out against them, dated 27th of September A. D. 1788, which had been duly returned *non est inventus*, and said debtors had avoided, etc.

Plea in bar — That said Goodwin and Plumb were openly and publicly about during the life of said execution, and said Plumb had sufficiency of estate to pay said execution, and the plaintiff levied said execution on the body of said Plumb on the 13th of November A. D. 1788, and held him until the 15th of said November when he released and set him at liberty, by a written order from John C. Smith, Esq. attorney to the creditor; and on the 22d of said November the plaintiff returned said execution with the following indorsement thereon, viz. Canaan November 13th 1788, then by virtue of this execution I levied on the body of the within named Frederick Plumb, and on the 15th of said November I received written orders from John C. Smith to let said Plumb go, said Smith being acting attorney to the creditor; also repaired to said Goodwin's usual place of abode but could find neither estate or person whereon to levy.

And the defendant further plead, that during the life of said execution, he offered and tendered to said John C. Smith, attorney aforesaid, sufficiency of personal estate belonging to said Goodwin and Plumb to levy upon and satisfy said execution, and requested him to permit the plaintiff, who had said execution, to levy upon it; but he absolutely refused, alleging that the estate was Plumb's and should not be taken; that afterwards the creditor prayed out an *alias* execution and levied upon the property of said Goodwin and sold the same for satisfying said execution.

Plaintiff replied — That the estate taken on said *alias* execution and sold amounted to only £10 17s. Demurrer to the reply.

Judgment — That the reply of the plaintiff is insufficient, for the following reasons; there ought to be the utmost fairness in the proceedings in order to subject the bail; and in this case, it appears that one of the debtors in the execution had sufficiency of estate, that his body was taken upon it, and held two days, and then released by order of the creditor's attorney; the presumption is that the debt was satisfied, until the contrary is made to appear: Further it is averred in the plea that both said Goodwin and Plumb were openly and publicly about and might have been taken, and that they did not avoid said execution which is admitted by the reply.

This cause was tried to the jury last court upon a special issue, and verdict for the defendant; on a motion in arrest, the verdict was set aside and a repleader ordered. A question was made, whether full cost should be allowed or only upon the repleader.

By the Court. The whole cost must be allowed.

REED V. TOUSLEY ET AL.

**The receiptsmen of property taken by execution are liable to the officer for the property, although the execution is otherways satisfied.**

Error to reverse a judgment of the County Court, in an action brought by Reed as constable against Tousley et al. declaring, that he had an execution in favor of David Buel,

against Lewis Delavergne, for £58, dated 27th April, A. D. 1790, which he levied on eight oxen belonging to said Delavergne, and posted them, etc. that the defendants received said oxen to keep and redeliver on the 15th of June, A. D. 1790, as by their receipt in writing by them executed ready to be produced in court appears. And that the defendants never delivered said oxen, etc.

Plea in bar — That although it be true, that they did make and execute said receipt yet they say, that in September A. D. 1789, said David took out an original execution and copies of the judgment on which it issued, and sent them to Mr. Spencer in the state of New York, where said debtor lived, and that said Delavergne paid said execution to said Spencer; and that afterwards the said David prayed out an *alias* execution in April, A. D. 1790, in order to vex and oppress said Delavergne, and delivered it to the plaintiff, who finding him in his precincts, levied it on the body of the said Lewis; and to release him from said levy, the defendants gave said receipt, and that no oxen were taken or delivered upon said execution; and said original execution was fully satisfied.

Plaintiff replied — That he levied said execution on said oxen, took and delivered them to the defendants, who received them, and undertook to redeliver them on the 15th of June, A. D. 1790, as by their receipt aforesaid; and as to the residue of the defendants' plea he says it is insufficient. The defendants say their plea is sufficient.

Judgment of the County Court — That the defendants' plea was sufficient.

Errors assigned — That said court ought to have judged said plea insufficient.

Judgment — Nothing erroneous.

Reasons of the court — The facts alleged in the plea in bar are; that this execution was an *alias* execution, procured by Buel with design to vex and oppress Delavergne, and under color of legal right to extort a sum of money from him

after he had received a complete satisfaction of the judgment by virtue of an execution issued thereon, and for which the attorney to said Buel, being fully authorized, had given his receipt in full.

By virtue of an *alias* execution the plaintiff took the body of Delavergne, and he was thereby compelled to procure the defendants to give the receipt mentioned for eight oxen to obtain his release.

Whether these facts being true, are a defense for the defendant is the question; if they are such as amount to a defense the demurrer is a confession that they are true. Whether they make a defense in the present action, and take from the plaintiff a right of recovery, must depend upon authorities and the reasons given in support of the authorities, and the conclusions that may be fairly made from the cases adduced, when applied to the present cause. 8 Cooke, 141, 2, 3.

If an execution issue from a court having no jurisdiction of the cause the same is void, and whatever acts are done under authority or by virtue of such execution are a nullity. And the party in whose favor such execution issues, or the officer who executes the same cannot justify or defend themselves (by virtue of the authority given them in such execution) in any action brought against them for taking either body or estate of the debtor to satisfy the same; but any plea resting upon such authority for justification, must be judged insufficient; the court in such case have no authority and consequently cannot give any authority to any other person.

If any execution issue upon an erroneous judgment from a court having jurisdiction of the cause, such execution is to every purpose a valid execution, so long as the judgment remains in force, and gives full and ample authority to the officer and to the party to proceed in the execution of it, to compel a satisfaction; and when either are questioned by action for anything done under authority derived therefrom, will be a defense or justification.

But as soon as the erroneous judgment is reversed for error, the party against whom the same was rendered and

against whom the execution issued, whenever such judgment and execution are plead as a defense or justification of any acts done after such reversal, can reply *nul tiel record* and such judgment is as to all such after acts, a void judgment, and such reply must be a sufficient one to such plea and destroy the defense.

If A is in execution at the suit of B, and the sheriff suffers A to escape, and after this the judgment is reversed for error, no action lies against the sheriff for the escape; for B to entitle himself to a recovery must not only declare against the sheriff upon the execution delivered him, but must also declare upon a legal existing judgment upon which the execution issued to entitle himself to a recovery, and when the sheriff pleads *nul tiel record*, the erroneous judgment being reversed is of no more consequence to the party, than if the same had been void at the first, rendering the same void as to its being a sufficient foundation for an action. If a judgment be rendered and afterwards a *scire facias* is brought and a second judgment rendered, the first judgment is after this reversed for error, the second judgment being dependent on the first shall be reversed also. 1 Sid. 306; 1 Saund. 37; 1 Levins, 191.

And whenever there are two judgments a second dependent on the first as its foundation, the first judgment being reversed the second shall be also reversed. If A. take an execution and the same is levied and the goods remain in the sheriff's hands for want of buyers, this the party knowing takes out a second execution and procures the same to be levied, the party injured can maintain an action against the party procuring such execution for the vexation. And a person may maintain action on the case against another, who sues against his release, or after the money is duly paid, though it be on a single obligation. Hob. 205, 206.

If a sheriff upon a *fieri facias* issued on a judgment rendered against B, takes the goods of B into his hands, but be-

fore any sale of them B delivers to the sheriff a *supersedeas* on a writ of error, good authorities say B shall have his goods again, for by the seizure the property is not altered. 11 Roll. 591; Yelv. 47.

The authorities cited prove that the officer executing any execution issuing from any court having jurisdiction shall be protected in such execution of his office and this as well on an erroneous judgment as a legal one, and this from necessity as well as the highest reason. The sheriff ought to be compelled to execute all executions issued by lawful authority and ought not to be allowed to question whether such authority in matters of judgment mistake or not, as such officer is to execute and not to judge, and obedience in the ministerial officers to the lawful writs and precepts of the judicial is of absolute necessity. But when at first, there is no authority vested in the court by law, but the court assumes a jurisdiction never given by law, of this the sheriff must take notice, and not proceed to act under a void writ or under an authority assumed without or against law.

And if a court, having jurisdiction, gives authority to a sheriff or officer, so soon as a superior tribunal for error or other cause revokes that authority, all the subordinate ministerial officers ought to pay obedience. An execution that issues after a judgment is paid and satisfied to the party, must issue wrongfully and with the knowledge of the party to whom the same is paid, that the same is wrongfully and unjustly issued. And for this cause it is reasonable that such party should never be benefited thereby.

The party therefore who takes out an execution upon a satisfied judgment, can never have any aid of law to carry such judgment into effect, for as to him in judgment of law it has no other operation than a void judgment has, that is rendered by a court having no jurisdiction, and no assistance can reasonably be given him to obtain a satisfaction of a judgment which he acknowledges is in full; and the rule is that wherever a creditor gives a receipt that he has received in full of an execution, it is not only evidence that the judg-

ment is paid, but in judgment of law such judgment is discharged, and whether such discharge appears of record or not, doth not seem to be of any importance from the authorities. The property of the oxen in the present instance was not changed by the levy of the execution, nor was the debtor in the execution divested of the property by anything done by the officer, here was no sale at public vendue, from which there might be a necessity of quieting a purchaser at public auction, ordered by authority in the possession and property of the articles sold. But a mere taking by the officer and a delivery to the receiptsmen, by the procurement of the owner of the cattle (as the receipt and other matters evince.) The party in the former action can have no action against the officer, for anything respecting this execution, the same as to the party was void.

The sheriff or officer is not liable to any action for the taking, because the court who had jurisdiction of the cause issued this execution, though improvidently after the same was satisfied; the sheriff therefore had authority to take the goods into his possession, because so commanded by authority. But the sheriff has no greater right to retain the goods on a judgment that is satisfied than he has on a judgment reversed for error, or that was void when rendered, and though by law he may be protected for what he has done, yet he had no right to recover this property from any other person, into whose hands it came, nor can he maintain an action for the same, having no property actual or special; but the property being in judgment of law in the original debtor. And in the present case no inconvenience can happen to the officer, the debtor procured the delivery of this property to the receiptsmen, the officer did it at the desire of the debtor, he can therefore have no action.

The property is in the same situation as it would have been had it been taken by an officer on an erroneous judgment, and while the judgment was in force, but afterwards before the sale of the property, the judgment is reversed, in such case the property is never changed. It belongs to the original debtor

into whose ever hands it may have come, unless by public sale by order of law the property has been changed, and any bailee into whose hands it may have come must restore it. The officer's fees depend upon the same principles as the debt in the execution and for the reasons given cannot be recovered from the debtor in the execution; and the officer has no lien on the estate taken nor can he recover of the receiptsmen; the party who has caused him to levy an execution issued upon a satisfied judgment must pay him if he ever receives any compensation.

Adams and Root, JJ., dissented from the opinion of the court, for the following reasons, viz. It appears that the plaintiff was a lawful officer, and had in his hands a lawful writ of execution in favor of David Buel against said Delavergne, which he was bound by law to execute; that he levied said execution on eight oxen, belonging to said Delavergne and posted them as the law directs; and that he delivered said oxen to the defendants, to keep and redeliver to him on the 15th of June A. D. 1790 and took their receipt and promise in writing for the same; the giving of the receipt is admitted by the defendants, but they say that this is an *alias* execution, and that a former execution had issued for the same debt, which had been paid to the attorney of said Buel, and by him was discharged, and this execution was taken out by said Buel to vex and oppress said Delavergne — and that no oxen were ever in fact taken by said execution, or delivered to them, etc. this last averment in the plea, being contrary to the receipt which is admitted, is inadmissible and must be laid out of the case.

The only question then is, Whether the former execution being paid and discharged, and this *alias* execution being taken out by the creditor, only for the purpose of oppression, without the knowledge or privity of the plaintiff, is a bar to the plaintiff's action. The ground of the plaintiff's right to recover is his responsibility for the property taken, and as it was lawfully taken by him, it is immaterial to which he is responsible, whether creditor or debtor, either is equally available for the purpose of this action.

Where an officer takes property on an execution, and the debt is otherwise paid to the creditor, the officer is accountable for the property to the debtor; and in that case he has equal right to recover it from his bailee, as if the creditor had not been paid. To render the bar complete, it must appear that neither the debtor or creditor hath any demand on the plaintiff.

This judgment was afterwards reversed in the Supreme Court of Errors, in May A. D. 1792, for the following reasons, viz.

**SUPREME COURT OF ERRORS, MAY, A. D. 1792.**

REED V. TOUSLEY ET AL.

Two questions arise on this defense — 1st. Whether on these pleadings it appears that no oxen in fact were taken from the debtor, or delivered to or received by the defendants; and if the contrary appears, then 2d. Whether the residue of the defense is sufficient or not.

As to the first, the defendants having admitted the authenticity of said receipt by which they have acknowledged under their hands, that they have received the oxen, it is incompetent for them, in the same breath to deny that they have in fact received them; they are precluded by way of estoppel to do this; and the contrary principle once admitted would effectually destroy the evidence that arises from all writings whatever, as it would be setting up parol proof, as evidence of a higher nature, than the evidence of writings, and by which the latter might be controlled and set aside; but the law, which in this point is founded in the highest reason, will not admit.

And indeed, though the defendants have in general terms, denied the actual receipt of the oxen, yet they have not done it in a way that the law will notice, for had they meant to avail themselves of this, and it were competent for them to do it, they should have traversed the receipt of the oxen, and put it in issue to the jury, which they have not done, nor has

there been any trial of the fact; it was sufficient for the plaintiff therefore, and indeed all that he could do, to reaffirm the facts as in his declaration; and the defendants by closing the demurrer to the residue of the plea have given up this point, and having admitted the authenticity of the receipt they have effectually admitted, the actual receipt of the oxen.

This being so, the second question arises — Whether the residue of the defendants' plea is sufficient or not; the seeming force of this plea, consists in this, that at the time the plaintiff took the oxen of the debtor, and delivered them to the defendants, the judgment on which the execution issued was completely satisfied and discharged; but still though the creditor was a wrongdoer, in praying out the *alias* execution, and ought to take no benefit of his own wrong; yet the officer was bound to obey his writ issued from a court that had cognizance of the cause, and so far from being a trespasser, in taking the debtor's oxen he did no more than he was bound to do; and consequently such construction must be put upon the whole transaction as will save him from loss and damage.

Now it cannot be doubted, but an officer who takes property on an execution, is bailee of that property for the purposes of law, and must account for it to the creditor in case the judgment is not otherways satisfied, and if it is, to the debtor; and in the event of this case the officer must account for the property to the debtor, the judgment being otherwise satisfied: the circumstance that the debtor was privy to the delivery of the property to the defendants, and that it was done at his request, will not take away the liability of the officer; for the security for the redelivery was taken to the officer, and of which he alone can avail himself; it is not sufficient in this case to say that the property in the oxen was not changed, any more than if taken on an erroneous judgment, and before sale that judgment was reversed, and that consequently the debtor may take his property from the receiptsman, or wherever he may find it, for admit this, it will only prove that he has two remedies, of which he may take at his election; but the officer will not be exonerated until the debtor has obtained satisfaction from the receiptsman, and for a like reason

it will be insufficient to say, that the debtor has his remedy against the creditor, who is the only wrongdoer in this case, and for this additional reason, that he may be a bankrupt and unable to make satisfaction.

This point then, that the officer in this case is liable to the debtor for the property taken, being established, it will follow, by legal consequence that the receiptsmen must be liable to the officer for it, and it would be unreasonable to subject the officer, who has done his duty to the action of the debtor and to cut him off from his remedy against the receiptsmen, especially as this has been long sanctioned by the decisions of law.

### Mills v. Griswold.

**Voluntary communications of a party under engagements of secrecy, are to be testified, by a witness except those made to an attorney who is under oath to keep his client's secrets.**

Action of *assumpsit* upon a promise of marriage. Issue to the jury.

Question — Whether a witness is obliged to disclose upon his oath what the defendant had told him in confidence, and upon a promise to keep it secret.

By the Court. The distinction is, where the communications are necessary in the course of business, as of a client to his attorney, he may not disclose them, but where the communications are voluntary, as in the present case, his oath obliges the witness to tell the whole truth.

### Howel v. Seaman.

**A discharge of all debts, dues and demands, cuts off a special promise to pay the interest upon an assigned note.**

Action declaring, that on the 26th of July, A. D. 1783, the defendant gave the plaintiff his note for £1,000 money of New York, payable in one month without interest; and before August 1784, he paid £600 upon it; and to secure the interest upon the remaining £400 the defendant on the 3d of August A. D. 1784, executed his note as follows, viz. I do

hereby promise to pay George Howel, lawful interest on £400 York money, the balance due on a note given in Boston, July, 26th A. D. 1783, for £1,000; that said balance of £400 was not paid, until the 2d of December A. D. 1786; and that said note given in August A. D. 1784, was for the interest of the £400 from the date of the first note, which the defendant hath never paid, etc.

Plea in bar — That on the 6th of August A. D. 1784, the plaintiff and defendant settled all accounts, debts, dues and demands, subsisting between them, except said note for £1,000, dated 26th of July, A. D. 1783, which was assigned to Murray and Sansom of New York, and the defendant then paid to the plaintiff £28 York money, which the plaintiff received and gave him a discharge in the words following, viz. Received of Richard Seaman £28 York currency in full of all accounts, dues, debts and demands against him, except a note in the hands of Murray and Sansom merchants in New York, dated 26th July, A. D. 1783; August 6, 1784, George Howel, as by said discharge ready to be shown. Demurrer to the plea.

Judgment — That the plea in bar is sufficient.

The note for the interest on said £1,000 note is a distinct security from the note for the principal; and excepting that out of the discharge, did not except the note for the interest. Judgment for the defendant.

COGSWELL, EXECUTOR OF WILLIAM COGSWELL, v. WHITTLESEY AND SOCIETY OF NEW PRESTON.

In an action upon an *insimul computassent* the defendants cannot avail themselves of mistakes in the settlement.

DECLARING, that the defendants were indebted to the deceased £37 8s. 10d. lawful money, upon settlement of accounts made between the said deceased, in his lifetime, and the committee of the defendants on the 20th of August A. D. 1786; which the said committee by a writing under their hands of that date acknowledged to be due; with the interest from February A. D. 1786; which debt has never been paid.

Defendants plead in bar — That said William was treasurer, and one of the society's committee, and that in said settlement sundry mistakes were made in favor of said William, more than to the amount of said balance.

Plaintiff replied — That there were sundry settlements made by said William with said committee, in all of which the balance was found to be in his favor; that upon his decease his estate was represented insolvent, and a time limited for the creditors to bring in their claims to commissioners. That the defendants made no claim in that time against said William's estate, and that said writing was given by said committee, for the just balance due to said William.

Defendants rejoined — That the mistakes alleged in the plea in bar were made in the settlement. Demurrer to the rejoinder. Kirby, 150, Punderson v. Shaw.

Judgment — That the rejoinder is insufficient; the defendants are concluded by the settlement, and by their not exhibiting their claim within the time limited by the Court of Probate.

### Wadhams v. Vanderworken.

**A blank indorsement can extend to no note but that on which it is made — that it extends only to a power to collect and convert the money, and that the same is due.**

Error against a judgment of the County Court in an action brought by Vanderworken v. Wadhams, declaring that on the 1st of January A. D. 1788, the defendant sold and assigned to him two notes of hand against John Grant, both dated the 16th of October A. D. 1782, for the sum of £2 each; one payable the 1st of January the other the 1st of March next after their date, and warranted them to the plaintiff, which assignment is as follows, viz. I the subscriber for value received, do sell and convey the within notes of hand, to John Albert Vanderworken, and do warrant the same to be due, and if the within promisor, is not able to pay the contents, I promise to pay the same; and I do empower said Vanderworken to collect the same; which payment is to be made in a reasonable time, with interest, John Wadhams.

That said Grant was bankrupt and not able to pay anything; that the defendant had been notified thereof, and had not kept and performed his said warranty. Damage £10.

Plea — That the power of attorney and warranty was not the act and deed of the defendant. Issue to the jury.

Verdict — That said power of attorney and warranty was the act and deed of the defendant; and the jury found for the plaintiff £6 3s. damages, etc.

In this case the following bill of exceptions was filed and allowed by the judge, viz. That said two notes were wrote on one piece of paper; that the defendant wrote his name *blank* near the top of the paper, on the back of one of said notes; that said indorsement was wrote and filled up in court when said cause was upon trial before the jury, by the plaintiff's attorney; that the defendant offered witnesses to prove that when he wrote his name on said paper he wrote it blank, and that the defendant received it only as a carrier to collect the money due on said notes for the defendant; and that it was the express agreement of plaintiff and defendant, that no other use should be made of his name signed as aforesaid, but to write a simple power of attorney over it; which evidence said court refused to admit, and gave judgment for the plaintiff.

General errors assigned — And specially for not admitting said testimony.

Judgment — Manifest error.

By the Court. A blank indorsement upon the back of a note of the promisee's name, cannot operate as an assignment of any other note than that on the back of which it is written, although there be other notes writen upon the same piece of paper; and that a blank indorsement at most, only gives the indorsee authority to write over it a power to collect it, and an assignment of the property with a warranty that the money is due. As to whether the County Court erred in not admitting parol testimony for the purpose mentioned in the bill of exceptions, this court made no determination.

SMITH v. NORTHRUP.

**Duplicity is to be taken advantage of by a special demurrer only. After a general demurrer, the party may not alter to a special.**

ACTION on note, dated 24th of March, A. D. 1789, wherein the defendant promised to pay to the plaintiff £80 in soldiers' notes, in one year from the date; and that on the 26th of March, A. D. 1790, the defendant wrote at the bottom of said note, this may certify, that I will pay the interest of the above note, as by said note, etc. Demurrer to the declaration; which was closed last court and continued to this, and now the defendant moved to alter his plea from a general to a special demurrer, but not allowed.

Exception to the declaration — That it was double and contained two distinct causes of action; which required different answers.

Judgment — Declaration sufficient. Here is no duplicity; but if there was it cannot be taken advantage of under a general demurrer; the engagement wrote at the bottom of the note is no more than the law implied without it. The soldiers' notes which are promised being upon interest.

HOLBROOK v. HIDE.

**The service of a process against an absconding debtor, if an inhabitant of this state, must be by leaving a copy at his last usual place of abode.**

ACTION on note by attachment, against Hide as an absconding debtor, in which he is described to be late of Derby, etc. now resident in Brunswick in the state of Vermont.

Plea in abatement — That no property of the defendant's had been attached; that no copy had been left at his last usual abode in said Derby; nor otherwise than by leaving copies with Kibbe and Parsons, as attorneys factors, etc. to said Hide. Demurrer.

Judgment — Plea sufficient. The statute is express, that a copy shall be left at the defendant's last place of abode.

STRONG v. IVES.

**Where a prisoner escapes from an officer, and he advertises him, he may retake and hold him, after his writ is returned, and deliver him up to the court.**

ACTION for false imprisonment. Not guilty plead. Issue to the jury.

Case was — Ives was a constable had a warrant to arrest Strong on a prosecution upon the statute, for maintenance of a bastard child: Ives took him, and Strong made his escape; Ives advertised him, and returned said writ; Strong was taken and brought to Ives upon the advertisement; Ives received him and held him twenty-four hours, the warrant not being in his hands, but was returned to Litchfield; in said twenty-four hours, by the mediation of friends the affair was settled.

Question — Whether the defendant had right to take and hold him after said warrant was returned?

By court and jury the defendant is not guilty — The defendant not only had right, but it was his duty to take and hold said Strong, and to deliver him up in court upon said prosecution.

MOOR v. WATSON.

**If a deed is recorded in a reasonable time, under the circumstances, it will hold against an attachment, previously served.**

ACTION of ejectment. Plea — No wrong or disseisin. Issue to the jury.

The case was — The defendant was the original owner of the land demanded; Stephen Chubb a collector took and sold it for Watson's taxes, to Uriah Seymour; Watson was a poor man, the collector paid the taxes and took back a deed of said land from said Seymour to himself.

In the fall of the year A. D. 1789, the collector agreed to release the land to the defendant upon his paying the taxes, interest and cost. One Tryon of Wethersfield agreed to buy the land and give considerable more for it, provided he had a deed by a certain time; the defendant applied to Chubb the collector, and received a deed of said land from him, dated the 7th of September A. D. 1789, which was Monday; the

register lived about four miles out of the road to Wethersfield; the defendant went to Wethersfield to complete his bargain with Tryon, returned to New Hartford the next Saturday at evening, which was the 12th, and the Monday following in the morning, which was the 14th, said deed was left with the town clerk for record.

The plaintiff having several small debts against Chubb, and being informed that Chubb had given a deed of this land back to Watson, and finding the deed not left for record, on the 11th of said September he prayed out several attachments against Chubb; and attached this land, and had the service completed on the same day at eleven o'clock at night; he afterwards obtained judgments on said attachments, before a justice, took out executions and had them levied on this land, etc.

Question in this case was — Whether the plaintiff should hold the land against the defendant's deed, on the ground that he attached it before said deed was lodged for record? If he could hold the land, it must be because said deed was not lodged in a reasonable time, or upon the principle of fraud.

By our statute, no time is limited in which a deed must be lodged with the register for record; it must therefore be within a reasonable time, and of this the court and jury must judge upon view of the circumstances. As the plaintiff knew of the defendant's deed before he caused said land to be attached, it could be no fraud upon him.

Verdict and judgment for defendant.

KIRBY, ADMINISTRATOR OF GRANT, v. CLARK.

**Trover lies by an administrator for goods taken and converted in the lifetime of the intestate.**

ACTION of trover for goods converted by the defendant in the lifetime of the intestate. The question put to the court was — Whether the administrator may have this action for goods converted in the lifetime of the intestate?

By the COURT. The action lies in favor of the administrator for goods taken and converted by the defendant in the lifetime of his intestate.

HARTFORD COUNTY, FEBRUARY TERM, A. D. 1792.

PITKIN v. WELLES.

Chancery will not relieve the assignee of a note, which is discharged by the promisee, who is not insolvent, and compel the promisor to pay it to him.

ERROR to reverse a decree in chancery of the County Court, upon the petition of said Daniel Pitkin v. said Welles, showing that William Pitkin, Esq. late deceased, in his lifetime, viz. on the 15th of October A. D. 1787 for a valuable consideration, sold and assigned to him a note against said Welles, dated the 3d day of January A. D. 1771 for £14 lawful money, payable on demand with interest; that afterwards on the 15th of April A. D. 1788 he gave notice to said Welles of said assignment and requested him to pay it; that on the 19th of December A. D. 1788 said William Pitkin and said Welles had a controversy concerning certain lands, which they submitted to arbitration, and said arbitrators awarded said Welles to pay to said William £36 lawful money, and that they should execute mutual discharges to each other; and said Welles having had notice of said assignment and contriving fraudulently to avoid the payment of said note drew a discharge for said William to sign, extending to all demands by bond, note or executions; and said William not recollecting said note or supposing that it was paid signed said discharge, which is dated the 19th of December A. D. 1788 whereby said note was discharged at law; that said William had since died and his estate represented insolvent, which was now depending before commissioners; praying that said court would order and decree that said Welles pay him said note, etc. To which petition a demurrer was given and said petition judged to be insufficient.

Error assigned — That said petition ought to have been judged to be sufficient.

Judgment of the County Court affirmed. There being no direct averment that said William's estate is insolvent, and for aught appears is sufficient to pay all the debts.

STRONG V. MEACHAM.

A judgment against a defendant who is out of the state, upon default, ought to be that execution issue upon the plaintiff's giving bond according to the statute.

ERROR to reverse a judgment of the County Court in an action brought by Meacham against Strong on book describing him to be of Hartford in the county of Windsor in the state of Vermont, which action was continued to April County Court A. D. 1791, when said court gave judgment against him upon his default of appearing, and for the plaintiff to recover £20 debt and his cost, and that execution issue for the same accordingly; that on the 10th of October A. D. 1791 said Meacham prayed out his execution on said judgment for the sums therein contained without having lodged a bond with the clerk of said court agreeable to the statute in such cases provided.

Errors assigned — That execution ought not to have been granted until a bond was lodged with the clerk as aforesaid, and that said judgment ought to have been so entered up. 2d. That the granting of said execution as aforesaid was contrary to an express law of this state.

Judgment — Manifest error.

The statute referred to above, directs how actions brought against persons out of the state shall be continued; and that after such continuances the court may proceed to render judgment against them by default; and in such cases where judgment shall be entered up by default, after such continuances as aforesaid execution shall be stayed and not issue thereon until the plaintiff shall have given or lodged with the clerk, a bond with one or more sufficient sureties to the adverse party, in double the value of the estate or sum recovered by said judgment to make restitution and to refund such sum as shall be given in debt or damage as shall be recovered in a suit therefor, to be brought within twelve months, next after entering up the first judgment, etc. The judgment in this case is, that execution issue accordingly — whereas, the law is, that it shall not issue until bond is given as aforesaid, the judgment is therefore directly against the law. For the judgment ought to have been, that execution issue upon the

plaintiff's procuring bond agreeable to the statute in such cases provided.

This judgment was afterwards affirmed in the Supreme Court of Errors.

COUNTY TREASURER v. BURR ET AL.

A bond taken by a justice in a criminal prosecution, conditioned that the defendant shall appear, answer, and abide judgment, is a good bond.

SCIRE FACIAS upon a bond of recognizance entered into before a justice of the peace upon a prosecution against Noadiah Burr, Jr. for a breach of the peace, for assaulting and beating an officer, and resisting him in the execution of his office; upon which said justice ordered and adjudged that he should become bound with surety in the sum of £50 to said treasurer, to be paid upon condition that said Noadiah, Jr. shall fail to appear before the County Court to be holden, etc. and answer to said complaint, and to abide the judgment of said court thereon; and the defendants entered into a bond of recognizance of the tenor aforesaid, before said justice; that said Noadiah, Jr. appeared and plead to said complaint that he was not guilty; issue to the jury; and the jury brought in their verdict that he was guilty; and said Noadiah being three times called to appear before said court to receive the judgment of the court, upon said complaint, made default of appearing; and thereupon said bond became forfeited, praying for a remedy in the premises. Demurrer to the declaration.

Judgment — That the declaration is sufficient.

Exception to the declaration — That the justice had no right to require or to take a bond with a condition that the defendant should abide the judgment of the court.

By the COURT. Whether the justice ought to have imprisoned him had he refused to give bond with that condition in it, in case he had tendered a bond conditioned to appear before said court, and answer to said complaint, is not necessary to be decided in this case; it is clear that the bond is a lawful bond, taken according to the usual form, and the defendants are holden by it.

WADSWORTH, WHITMAN & CHAPLIN v. CHAMPION.

**In a sale of public securities, where the defendant has his election to return them at a certain time or to pay a certain sum for them — this is not usurious — nor is there any room for chancery, as to the damages.**

ERROR to reverse a judgment of the County Court, in an action brought by Champion against Wadsworth et al. upon a note dated the 20th of April, A. D. 1789, wherein the defendants jointly and severally promised the plaintiff to pay to him £3,609 14s. 7d. lawful money, within thirteen months from the date, with the lawful interest; demanding £5,000. Per writ dated 17th of June, A. D. 1790.

Plea in bar — That at the time of giving the note on which, etc. it was corruptly agreed between the plaintiff and defendants, that the plaintiff should lend to the defendants upon the application, and for the use of said Chaplin, the following public securities for the term of thirteen months, viz. A certificate of the United States, dated register's office, 10th of August A. D. 1787, certifying a balance due from the United States to Henry Champion the sum of $8,721 and seventy-one ninetieths, bearing interest at 6 per cent. from the 1st of July, A. D. 1780, and signed Joseph Nurse register, on which no interest had been paid. Also sixteen loan office certificates for $400 each, numbered from 3,382 to 3,397, inclusive; and one loan office certificate for $200, No. 4,252, all dated March the 30th A. D. 1778, signed Samuel Hilligas, and countersigned John Lawrence, commissioner, all payable to Henry Champion, with interest at 6 per cent. and on which no interest had been drawn since the 31st of December A. D. 1782.

All which securities were then worth in lawful money no more than £1,105 8s. 1d., and that in consideration of the loan and forbearance of the aforesaid securities for the term of thirteen months aforesaid, the defendants should execute the note on which, etc. for £3,609 14s. 7d. lawful money on interest from the date thereof, and also should execute one other note for the sum of £29 6s. 4d. lawful money, payable

in thirteen months with interest, and that in case the defendants should return at the expiration of said thirteen months and deliver to the plaintiff the same securities and certificates, without having drawn any interest upon them or either of them, the plaintiff would accept them in full payment of the note on which, etc. but on failure of their delivering said certificates the plaintiff to be holden to take nothing but specie on said notes; and that in pursuance of said corrupt agreement, the plaintiff loaned to said Chaplin said public securities for the term of thirteen months, and the defendants executed to the plaintiff the note on which, etc. and also a note for £29 6s. 4d., payable in thirteen months with interest, and for no other cause or consideration.

And the plaintiff made and executed to the defendants an agreement in writing, wherein and whereby he agreed and engaged, that if by the day the aforesaid note became due, the defendants should redeliver or pay to him certificates of the same description in all respects, and without any interest drawn on them more than had been upon these; that he would accept them in payment of said note; but on failure of paying said certificates to be holden to take nothing but specie on said note; and that by said corrupt agreement there was and is in fact taken, reserved and secured in and by the note on which the sum of £2,698 5s. 6d. lawful money over and above the lawful interest at the rate of 6 per cent. per annum for the loan of said securities for the term of thirteen months and for no other cause or consideration, and by the statute of this state said note is void.

The plaintiff demurred to the plea in bar. Judgment of the County Court — That the plea in bar was insufficient.

The defendants laid in a written motion to be heard in damages upon the chancery of said note; which motion said County Court refused to grant and gave judgment for the plaintiff to recover £4,033 17s. 6d. lawful money and cost.

The defendants then moved said court that they might be allowed to appeal said cause to the Superior Court, and ten-

dered sufficient bonds to prosecute said appeal, and said County Court adjudged that no appeal lay in said cause.

Errors assigned — 1st. That said plea in bar was sufficient and ought to have been so adjudged. 2d. In refusing to hear the parties in damages upon the chancery of said note. 3d. In judging that no appeal lay in said cause.

Judgment of this court — That there is nothing erroneous in the judgment complained of. All the questions determined by the County Court and complained of in the writ of error, depend upon the nature and true construction of the original contract between the parties, to be collected from the writings disclosed upon the record: and by them it clearly appears to have been a sale of those securities at a certain stipulated price, or to return the securities at the end of thirteen months, at the option of the defendant; they chose not to return them, consequently are bound to pay the stipulated sum secured by the note, which is much less than the nominal value and excludes every idea of usury.

The note is for the payment of money only and no payments are claimed to have been made upon it, there is no room for a hearing upon the chancery of said note, the parties having therein agreed the sum. Before the plea was entered by the defendant in error he suggested that said note was vouched by two witnesses and would so appear, had it been brought up in the writ of error, as it ought to have been, and moved for a *certiorari* to the clerk of the County Court to certify said note — which being done, it appeared to be vouched by two witnesses.

Dyer, J., dissented, upon the ground that the averments were positive, that more than lawful interest was included in said note by the corrupt agreement of the parties.

By the Court. The facts stated and disclosed in the plea do not warrant such an inference, and unless they do, the court cannot make it.

COWLES v. HART & BRISTOL.

*Indebitatus assumpsit* will not lie for the principal sum actually lent upon an usurious mortgage, which has been adjudged to be void.

ACTION of *indebitatus assumpsit* for money paid and advanced to the defendants. Plea — *Nonassumpsit.* Issue to the jury.

The jury found a special verdict, that on the 27th of December A. D. 1785 the plaintiff at the special instance and request of the defendants, did pay to their use, the sum of £59 18s. 9½d. lawful money; that the defendants were at that time indebted to the plaintiff for goods, etc. sold them; also that they were indebted to Nehemiah Street in like manner; that afterwards, on the same day, the plaintiff, said Street and the defendants accounted together for all said several sums of money, and it was then and there afterwards on the said day, corruptly agreed by and between the plaintiff, said Street and the defendants that the plaintiff and said Street should give the defendants further forbearance for the term of two years, for which the defendants should pay the lawful interest on all said sums; and also a further sum over and above the lawful interest, together with said sum of £59 18s. 9½d. amounting in the whole to £460 lawful money, and that the defendants should secure the same by a mortgage of certain lands, according to said corrupt agreement, and for no other cause, and in pursuance of said corrupt agreement the defendants secured said sum of £460 to be paid by mortgages of certain lands, and describes them; which several deeds have been adjudged to be usurious and void by the Superior Court; and that no part of said £59 18s. 9d. hath ever been paid to the plaintiff, and refer the question of law to the court upon the facts aforesaid.

The court were of opinion — That the law is so upon the facts aforesaid that the defendants did not assume and promise; and gave judgment for the defendants to recover their cost.

The statute makes void all obligations, securities, mortgages, etc. given for more than lawful interest as a penalty

upon the lender, and for the protection of indigent borrowers. If the plaintiff might recover the principal of his debt in this action, after his security is avoided, the design of the statute would be in a measure defeated — the manifest intention of which is not only to make void the security; but the debt also.

STATE v. LAWRENCE.

**In a general action of *indebitatus assumpsit* — mistakes in settlements or other special matters, may not be given in evidence.**

ACTION of *indebitatus assumpsit* for money had and received generally. Plea — *Nonassumpsit.* Issue to the jury.

The plaintiff offered to give in evidence certain mistakes made in a settlement between the treasurer of the state and the defendant, upon which receipts were passed — which was objected to, as it would be a surprise upon the defendant.

By the COURT. The evidence is not admissible; for it would be to surprise the defendant with claims of which he has had no notice. The action in such case ought to be special, particularly pointing out the mistakes that had been made in the settlement. Kirby's Reports, Hart v. Smith, 127.

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**TOLLAND COUNTY, FEBRUARY TERM, A. D. 1792.**

STANIFORD ET AL., HEIRS OF STOUGHTON, DECEASED, v. HIDE, A CREDITOR AND ADMINISTRATOR OF SAID STOUGHTON.

**Commissioner on an insolvent estate can offset only the mutual claims between the creditors and the deceased.**

APPEAL from probate. Hide represented said estate insolvent and had commissioners appointed, to whom he exhibited a debt which he claimed against said estate, and the commissioners adjusted not only the debt and credit between said Hide and the estate to the time of said Stoughton's death, but also offset against his debt moneys received by him as administrator for debts and rents, which reduced his debt to about £40; Hide excepted to the return of the commissioners

before the Court of Probate on that account, and the judge set aside the report of the commissioners; Staniford et al appeal to this court.

And by this COURT. The judgment of the Court of Probate is affirmed; for commissioners on an insolvent estate, are to offset mutual claims between the creditors and the deceased; but what Hide had received as administrator, cannot be offset against his debt; but is to be averaged by order of the judge, amongst all the creditors.

SOMERS v. BARKHAMSTEAD.

A foreigner gains a settlement in no town in the state by commorancy.

ACTION of the case, for sending into Somers Robert Tudman, a pauper, with his wife and family without law and right, in June, A. D. 1790.

Plea — Not guilty. Issue to the court.

The case was — Tudman was a foreigner, he married a wife in Stafford, and went and lived in Somers; in A. D. 1788, he was warned out; he then removed to Barkhamstead, and dwelt there ten months, and then was removed by order of the civil authority and selectmen to Somers, and had been chargeable to Somers; for which they demand £34.

The court found the defendants guilty. Tudman being a foreigner, hath a settlement in no town which is obliged to maintain him, and belongs to the state to provide for; Barkhamstead's sending him to Somers was a trespass, for which this action lies. Cause continued and judgment was finally rendered for £30 damages.

TOLLAND v. LEBANON.

A certificated pauper removing and residing in the town for which said certificate is given, more than one year without lodging it with the town clerk, gains a settlement by commorancy.

ERROR to reverse a judgment of the County Court, in an action Tolland v. Lebanon; for transporting one Spencer a pauper, with his wife to Tolland, without law and right, etc. damage £20.

Plea in bar — That on the 8th of December 1783, said Spencer was a legal inhabitant of said town of Tolland, and being about to remove to some other town, applied to and obtained from the civil authority and selectmen of said Tolland, a certificate that he was a legal inhabitant of said Tolland; that sometime after said Spencer came into the town of Lebanon with said certificate, and lodged the same with the town clerk of said Lebanon; in consequence thereof he was permitted to reside in Lebanon as one of the inhabitants of said Tolland, and he being reduced to want, they sent him with his wife back to Tolland, as they had good right to do.

Plaintiffs replied — True, that in A. D. 1783, said Spencer was an inhabitant of Tolland, and that he received a certificate as alleged in the plea in bar; yet they say that he removed and dwelt in the town of Ashford from the date of said certificate, until the 8th of June, A. D. 1785, being more than eighteen months without lodging said certificate with the town clerk of said Ashford, or ever being warned to depart said town, and married a wife there, and on the 8th of June, A. D. 1785, said Spencer and wife, being legal inhabitants of said town of Ashford, removed from thence into the town of Lebanon, and have there resided from said 8th of June, A. D. 1785, to the 23d of December A. D. 1790, without ever being warned to depart said town, until they were removed to said Tolland as aforesaid; of which town they are not legal inhabitants.

Defendants rejoined — That the authority and selectmen of Ashford knew that said Spencer was an inhabitant of said Tolland, and that he had a certificate from the authority and selectmen of said town; and thereupon permitted him to reside in said Ashford the time aforesaid.

The plaintiffs sur-rejoined — That said Spencer resided in said Ashford in no other manner than is set forth in their reply. Demurrer.

Judgment of the County Court — That the sur-rejoinder of the plaintiffs was insufficient, and for the defendants to recover their cost.

Error assigned generally — That judgment ought to have been, that the sur-rejoinder of the plaintiffs was sufficient.

Judgment of this court — That there is manifest error in the judgment complained of.

The statute is — "That any inhabitant of any town in this state, may for the better support of himself or family, have liberty to remove with his family into any town in this state, and continue there without being liable to be removed; provided such person procure a certificate in writing, under the hands of the civil authority and selectmen of the town from whence he removes, that he is a legal inhabitant in that town, and lodge the same with the clerk of the town to which he removes."

Spencer's being permitted to reside and dwell in said Ashford without lodging his certificate with the town clerk, more than a year, gained him a settlement in said town by commorancy. The certificate from Tolland, at the time he removed to Lebanon, was of no effect to prevent his becoming an inhabitant there, for although it was true at the time when it was given, it was not true at the time when he removed to Lebanon.

### Moor v. Sessions & Sterns.

**A condition that a man shall not be molested in his title to land, is to be construed to mean a legal molestation.**

Action on a note for £20,000 dated the 11th of March, 1780.

Plea in bar — That said note hath conditions annexed to it, viz. that if the within-named Moor, be molested of said land he holds a deed of from said Sessions and Sterns, in Union, dated March 11th, A. D. 1780, then Sessions and Sterns to bear two-thirds of the cost; if he is never molested, then this note to be void, and that the plaintiff hath not been legally molested in the enjoyment of the lands contained in their deed.

The plaintiff replied — That he had been molested in the enjoyment of two pieces of land in said deed, in a twenty-

acre, and a forty-acre piece, of the value of £200, and had been deprived of them.

The defendants rejoined — That the plaintiff and the defendants purchased of William Burnet Brown, all the land he owned in Union, being about 2,000 acres, said two pieces mentioned in the plaintiff's reply having before been sold for the payment of taxes; did not pass from said Brown by his deed to them dated September A. D. 1779; and to make partition among themselves, the defendants by deed dated the 11th of March, A. D. 1780, did give, grant, and quitclaim to said Moor, all such right, title and interest or demand, that they had in and to six certain lots of land, which they said Moor, Sessions and Sterns lately purchased of William B. Brown, lying in said Union, and containing about 500 acres, and are lots No. 1, 2, 3, 15, and 26, called hatchet lot, and ninety acres bought of Stoughton, to have and to hold said quitclaimed premises; and covenanted that they were well seized of the premises, as a good indefeasible estate in fee-simple; and that they had good right to sell the same as aforesaid, and that the same was free and clear of all incumbrances; and thereupon say that the plaintiff ought to be barred without that, that the plaintiff has been legally molested in the enjoyment of said lands.

Plaintiff affirmed his reply. Issue to the court.

Judgment — That the plaintiff hath not been molested in the enjoyment of said land, as the plaintiff in his sur-rejoinder hath alleged. The covenants in the deed, are to be construed to extend only to the right, title and interest, the defendants had in the land.

In the case of Baldwin v. Leffingwell, adjudged March, Superior Court, Norwich, A. D. 1774, which was an action upon the covenants of seisin in a deed, the words of the deed were — all my land lying within the following metes and bounds, viz. describes the bounds; containing 100 acres more or less, covenanting that he was well seized of the said granted premises. The defendant owned said 100 acres as tenant in common with Reed and Bushnel.

The question was upon the construction of the deed — Whether the words in the deed, all my land, etc. was to be understood, the whole of the land contained within said bounds; or only all the land or right the defendant owned within said boundaries; the court understood them in the latter sense, and judgment was for the defendant.

And it did not appear that the plaintiff had been evicted or anyway molested by any who had a legal title to said land, without which he could have no right to recover; for neither the words in the condition of the note, or in the covenants in the deed, can by any construction be extended to a tortious, and unlawful molesting of the plaintiff.

FREEMAN v. THOMPSON.

**A deed of lands of which the grantor is disseized is void,**

ACTION of ejectment. Plea — Not guilty. Issue to the court. The plaintiff's title was a deed from Libret, who had an execution against said Thompson, which was levied upon this land, and appraised off in satisfaction of it; Thompson claimed that the levy of said execution was irregular and continued in possession holding and claiming said land against said levy, at the time when said deed was executed to the plaintiff. The defendant offered proof to show that one of the appraisers, who was appointed by a justice of the peace was not a proper person to be an appraiser; and by the court the proof was admitted.

Judgment — That the defendant is not guilty upon the principle that the deed from Libret to the plaintiff, is void by the statute, the grantor being dispossessed and disseized by the defendant at the time of his executing the deed. See Holbrook v. Lucas, New Haven, August Term, 1790.

**WINDHAM COUNTY, MARCH TERM, A. D. 1792.**

ABBY v. CARGEL.

**If a justice goes out of his town to try a cause it is error.**

ERROR, complaining of a judgment of Justice Childs of Woodstock, in an action brought by Cargel v. Abby, both of Thompson, for a mistake made in a settlement, alleging that there were justices in said Thompson who could by law judge between the parties.

The judgment was reversed, being a point long since settled.

GILBERT v. STEADMAN.

**The courts in this state have not jurisdiction to try a theft laid to have been committed in another state.**

**In a prosecution for theft the jury must find the value of the goods stolen.**

QUI TAM prosecution for stealing a quantity of goods from the plaintiff's shop in Mansfield in the county of Bristol, and state of Massachusetts, in company with one Mount and his wife, and for receiving and concealing them knowing them to be stolen; to the value of £32 lawful money.

Plea — Not guilty. Issue to the jury.

Question — Whether the plaintiff could be a witness as he was interested in the event of the suit.

By the COURT. From the necessity of the case he may be admitted to testify to the loss of the goods, and to the identity of them. The jury found the defendant guilty, and £90 damages.

Motion in arrest — That the declaration is insufficient, for neither the stealing of the goods, or the concealment of them is laid to have been in this state. 2d. The verdict has not found the value of the goods stolen or concealed, but only a round sum in damages.

Judgment — That the motion in arrest is sufficient upon both exceptions. The crime charged was committed in the state of Massachusetts, and out of the jurisdiction of this court. It is the province of the jury to find the value of

the goods stolen, and of the court to render judgment for treble the value by way of penalty.

RIPLEY v. FITCH.

Under the plea of *non assumpsit* to a note, full payment cannot be given in evidence.

A party may have liberty to alter his plea after the evidence is begun to the jury.

ACTION upon a note for £200, dated 27th of September A. D. 1769. Plea — *Nonassumpsit.* Issue to the jury.

Determined by the court — That under this issue the defendant cannot give in evidence payment of the note; this would be to surprise the plaintiff, when he comes prepared only to prove the promise. The defendant by undertaking to prove payment, admits, that he did promise contrary to his plea; and to show that he is discharged from it, by having performed it. The distinction is, that in an implied promise payment may be given in evidence under the plea of *non-assumpsit*, for that extinguishes the promise, which continues no longer than the duty subsists, but in an express promise, both reason and the law is otherwise.

The defendant moved for liberty to alter his plea, and to plead full payment; which was allowed by the court. The cause was afterwards referred.

MATSON v. PARKHURST ET AL., HEIRS OF JOSEPH PARKHURST, DECEASED.

Chancery will relieve an assignee of a bond for a deed, against the heirs of the obligor, on the ground of mistakes and accidents.

PETITION in chancery, alleging that on the 19th of January A. D. 1775 Weaver agreed to purchase of said Joseph deceased, and Gleason a certain tract of land, [boundaries described] which they jointly owned as tenants in common, at the price of £150 lawful money, for which said Weaver gave to them his note, payable in two years from the date, and said Joseph and Gleason executed to said Weaver their bond, binding themselves, their heirs, executors, etc. to execute to him a deed of said land upon his paying said note; that said Weaver within the two years aforesaid, for a valuable consideration, sold and assigned to the petitioner said bond

for a deed; that said Joseph Parkhurst died, leaving the petitionees his heirs and legatees; also a plentiful estate which has descended and come to them, having appointed said Gleason his executor.

That the petitioner within said term paid said Gleason, executor of said Joseph, said £150 and took a deed from him alone of said land and delivered up said bond for a deed, given by him and said Joseph, supposing said deed had conveyed the whole land; said Gleason had since become a bankrupt and no bond was taken at the Court of Probate that he should faithfully execute his trust; and the petitionees have instituted a suit at law for the recovery of their half of said land which is now pending in this court; praying that the petitionees may be compelled to convey to him their half of said land, according to the agreement in said bond, and that they be laid under a perpetual injunction never to prosecute their said suit at law for the recovery of said land.

Plea in abatement — 1st. That the petitioner has a remedy at law against said Gleason upon the covenants in said deed. 2d. That the money was paid to said Gleason and the heirs of said Parkhurst have not received any benefit by it. 3d. That the facts stated in the petition, do not entitle the petitioner to relief in chancery.

Judgment — Plea insufficient.

The petitioner gave to said Weaver a discharge, and moved to have him sworn as a witness — which was objected to. He was admitted and sworn.

The petition was heard upon the merits, and the facts therein stated being found to be true, was granted. Which was carrying into effect substantially and specifically the original contract between the parties, which by accident and mistake had been prevented.

ABBOT v. KNIGHT, OF PLAINFIELD, IN THE COUNTY OF WINDHAM.

**A judgment creditor in another state may elect either to prosecute his bail there, or bring debt upon the judgment here.**

ACTION of debt on a judgment recovered before the Superior Court in the state of Rhode Island, in an adversary

suit, for £23 6s. 5d. by verdict of a jury; on which the plaintiff took out an execution, which had been duly returned *non est inventus*, and said judgment and execution remained wholly unpaid and unsatisfied.

Plea in bar — That the defendant was attached in the aforesaid suit, and that he procured and caused to be given good and sufficient bond with surety of said state of Rhode Island, that he would appear and answer said suit, and abide the final judgment that should be rendered therein, and that the plaintiff had complete and adequate remedy against his said bondsmen in said state of Rhode Island, they being alive and abundantly able to satisfy said judgment, and who had ever stood ready to pay and satisfy the same in the good and lawful money of said state, and did tender £62 in payment of this and another judgment, which the plaintiff refused to accept, and said bail had offered to turn out estate to satisfy said execution.

The plaintiff replied, that the sum tendered by said bail, in payment of said execution, was paper money of said state. Demurrer.

Judgment — That the reply of the plaintiff is sufficient. The plaintiff has his election to take his remedy by *scire facias* against the bail in the state of Rhode Island, or to bring an action of debt upon the judgment against the defendant in this state.

### Whitly v. Barker.

**Service upon a writ indorsed by an attorney, doth not conclude the party, without special authority.**

Writ of Error against the judgment of the County Court, in a certain cause, in which Col. Cleaveland was attorney to said Barker who lived in this state; Cleaveland indorsed upon the writ of error, as attorney to Barker that he acknowledged said writ had been duly served, without any special authority from Barker to do it. Barker plead in abatement of the writ that it had never been served upon him, as the law required.

Plea in abatement adjudged sufficient; the party is not concluded by the indorsement of the attorney in such case, without special authority.

KIPPLE AND CALKINS v. COLEMAN.

If a writ is directed to a constable of one town to serve upon a defendant living in another — if he returns service in the town of which he is constable, it is good — one defendant cannot take advantage of a defect in service upon the other.

ERROR to reverse a judgment of a justice, in a *qui tam* prosecution for a breach of the peace, brought by Coleman against them; the writ was directed to either of the constables of the town of Lebanon in Windham county; Kipple was described of said Lebanon, Calkins was described to be of Bozrah in New London county.

The officer's return of service was — Lebanon, Windham county, August 29th A. D. 1791, I then for want of estate, arrested the body of the within Thomas Kipple, jr. read said writ in his hearing and have taken sufficient bonds for his appearance at court. O. Wattles, constable. And on the same 29th day of August for want of estate, I arrested the body of the within named Durkee Calkins, and have taken sufficient bonds for his appearance at court, etc. O. Wattles.

To which process the defendants plead in abatement, that said process had been no otherwise served on said Calkins, than by said Wattles, constable of Lebanon attaching his body and reading it in his hearing, which attaching and reading aforesaid was in said Bozrah and out of the official precincts of said constable.

The justice judged said plea to be insufficient; and upon the plea of not guilty the defendants were found guilty, and judgment for the plaintiff to recover £2 damages and cost.

Error assigned — That said justice ought to have judged said plea in abatement sufficient.

Judgment affirmed. The indorsement of service by the constable is in Lebanon, etc. where said Calkins might be and the presumption is that he was at the time of service: the plea

says the service on Calkins was in Bozrah, but doth not traverse or deny its being made in Lebanon. 2d. If there is a defect in the service, as to Calkins, he only can take advantage of it; the plea is insufficient therefore as applied to both.

In the case of Hallam and Adams against Mumford, New London Superior Court, September 1773, it was determined upon a writ of error, that in an action brought by Mumford against Hallam and Adams upon a joint and several note, said Hallam being a minor, Adams could not avail himself of Hallam's minority, by pleading it in abatement or otherwise; as also is the case of a misnomer, the party only who is misnamed can take advantage of it.

ASPENWALL v. WHITEMORE.

**Parol evidence not admissible to prove the contents of a libelous writing.**

ACTION of the case for saying that the plaintiff was a thief and had stolen his timber and for writing and publishing a certain advertisement, therein charging the plaintiff with having stolen from him, and offering a reward to any person who would take up and secure the plaintiff that he might be brought to justice. Plea — Not guilty. Issue to the court.

Parol evidence was offered to prove the contents of said libelous writing. By the court — The writing must be produced, parol evidence not admissible to prove the contents, unless it is lost or destroyed or is in the hands of the defendant.

TOWN OF WINDHAM v. TOWN OF NORWICH.

**Citizens belonging to other states are not to be considered as foreigners, but their wives and families are settled where they are settled.**

ACTION of the case for transporting into said Windham from the town of Norwich against law and right, on the day of October A. D. 1791, one Esther Heriden and four children, who were paupers, and who did not belong to said Windham whereby the burden of supporting them was thrown upon said Windham. Plea — Not guilty. Issue to the court.

The state of the case was — Said Esther was born in the town of Windham, and on the 23d of November A. D. 1782, removed with a certificate from said town of Windham to Norwich, which certificate was duly lodged with the town clerk; on the 11th of September A. D. 1783, she was married to William Heriden of Norton, in the state of Massachusetts; about two years ago he went off and left his wife and family, said Esther not having gained any settlement out of the town of Windham, except in right of her husband, in said town of Norton.

Question — Whether as the husband's settlement was in another state, he was to be considered as a foreigner? And her settlement at Windham, which had been suspended by the marriage, was to be revived by his going away and absconding.

Judgment — That the defendants are guilty. That the citizens of the other states in the Union, are not to be considered as foreigners; and the wife is settled where the husband is settled.

SWEET v. DOW.

A cause which appears to the court not to be appealable, they will *ex officio* dismiss.

ACTION of trover for some bark, brought before a justice, demanding £2 lawful money damages.

The defendant admitted the facts but plead — That the land on which the trees grew, from which said bark was taken, was the land of the defendant; which cause was tried in the County Court and appealed to this court: The court observing the pleadings, ordered the cause to be erased from the docket; it not being appealable. In the case of Belton v. Christophers, sheriff at New London, September 1773, for an escape after issue closed to the jury, the court dismissed the cause because it appeared not to be appealable.

DURKEE v. VARNUM.

After a defendant in his plea has confessed himself guilty of committing a trespass, he cannot justify by setting up title.

ACTION of trespass brought before a justice for throwing down the plaintiff's fence, carrying away his rails, and eating up his grass; demanding forty shillings damage.

The defendant before the justice plead — That true it was he was guilty of doing the trespass complained of in the plaintiff's declaration, but had good right to do it; for that he was the proprietor and legal owner of the land whereon said trespass was said to have been committed.

The plaintiff traversed this plea in the County Court where said cause was tried, and appealed to this court, and the parties were at issue to the court upon the same facts.

By the COURT. The defendant has confessed himself guilty of the trespass; after this if the court should find that he was proprietor and legal owner of the land it would not justify him, for a man may be guilty of a trespass upon land of which he is the legal owner, where another has the right of possession and improvement. The cause was ordered to be erased from the docket.

DAVIS v. GEARY ET AL.

A creditor accepting from his debtor a release of his equity of redemption in certain premises mortgaged to secure a debt, of more value than the debt in satisfaction of it, will operate as a payment of the interest of said debt.

ACTION upon a writing promising to pay the interest upon a certain execution for £257. Plea — Not guilty. By consent of parties, issue to the court.

The case was — The defendants owed the plaintiff by note which was upon interest, and to secure the payment of it, mortgaged a tract of land of much greater value than the debt; the plaintiff sued said note, recovered judgment upon it for the aforesaid sum, and took out execution, and to secure the interest upon said execution the writing aforesaid was given. Afterwards it was agreed, that the defendants should

release their equity of redemption in said mortgaged premises, and the plaintiff should accept of it in full satisfaction of said debt, without anything more explicit; and the defendants in execution of said agreement on their part made and delivered to the plaintiff a release of their equity of redemption in said mortgaged premises, which the plaintiff accepted: But neither said execution nor said promissory writing was indorsed or delivered up; and the mortgaged premises were of more value than said execution and the interest upon it.

By the COURT. Judgment must be for the defendants. For the agreement is clearly to be understood to extend to the interest on the execution secured by the writing on which, etc. as well as the principal debt in the execution.

BUNDY v. SABIN ET AL.

**A bond with a condition containing a submission to the award of arbitrators — necessarily implies that the obligor will keep and perform the award.**

ACTION of debt on bond, dated October A. D. 1791, for £100.

Plea in bar — That said bond hath conditions which are as follows, viz. Whereas said parties have a controversy in the Superior Court — Now know ye that we have submitted said controversy to S. G. S. arbitrators, to hear and determine said matters of controversy according to law and the evidence produced on trial, on or before the 10th of October A. D. 1791, and their award make in the premises according to law and evidence, said parties to meet at said Bundy's on the 4th of October A. D. 1791, alleging that the defendants had kept and performed the condition of said bond.

The plaintiff replied and admitted the condition of said bond to be as set forth; but said that said arbitrators took on them the burden of an award; heard the parties at the time and place mentioned in the condition, and made and published their award in the premises as follows, viz. sets forth the award, in which they awarded the defendants to pay the plaintiff the sum of £18, etc. and avers that the defendants

have not kept and performed said award, and traverses the defendants having kept and performed the condition of said bond.

The defendant rejoined — That he had kept and performed the condition of said bond. Issue to the court.

The court found that the defendants had not kept and performed the condition of said bond, for that there was necessarily implied in the condition of said bond an obligation to perform said award.

### Dyer v. Elderkin.

The court will give interest upon a note not expressed to be on interest, under certain circumstances where equity requires it.

Action on a note, dated July 22d, A. D. 1779, in words following, viz. Then received of E. Dyer, 3245 continental dollars, to procure cloathing for the continental soldiers from this state, which is delivered me for that purpose, according to the recommendation of the general assembly of this state, I being appointed by the town of Windham to that service. Signed, Joshua Elderkin, committee for cloathing.

The defendant took benefit of this money in his settlement with the pay table; the cause was defaulted, and heard in damages: The court reduced the note and the indorsements upon it by the scale at their respective dates, into lawful money, and gave judgment for the balance, with the lawful interest — for the resolve of assembly is that interest shall be allowed upon money thus loaned. This judgment was affirmed in the Supreme Court of Errors.

### Miller et al. v. Dow.

Lands may be holden by a fifteen years' possession, under certain circumstances, although not inclosed with a fence.

Action of ejectment for fifty acres of land in Plainfield. Plea — No wrong or disseisin. Issue to the jury.

The plaintiffs derived their title from old Mr. Winthrop who held under a grant from the proprietors.

The defendant gave in evidence, that he and those under whom he claimed had been in the possession of said land more than fifty years, claiming the same, taking the whole profits and holding all others out therefrom, in manner following viz. the greater part was actually inclosed with a fence, cleared and improved for grass, grain, etc. the other part adjoining not inclosed by a fence, was claimed, holden and improved for a wood lot, on which he yearly got his wood and timber keeping all others out therefrom.

Verdict for the defendant, generally that he had done no wrong or disseisin; which was accepted by the court, upon the principle that the manner in which he claimed, possessed and improved the uninclosed part lying connected with the inclosed part; announced to the world his ownership of it, by acts of equal notoriety as though it had been inclosed with a fence. See Smith v. Isaacs, New Haven, January Term, 1790.

SPALDING v. DUNLAP.

**If auditors have exceeded their commission or made a mistake upon their own principles — they may be inquired of.**

RETURN of auditors in an action of account; to which a remonstrance was made.

Ruled by the court — That if it is alleged that the auditors have exceeded their commission, or made a mistake upon their own principles, they may be inquired of. See State v. Worthington, Hartford, September Term, 1789.

HUBBARD ET AL., CREDITORS OF CHARLES HINKLY, DECEASED, v. JARED HINKLEY, EXECUTOR OF SAID CHARLES.

**Where a man dies in this state leaving an interest and an executor, and also real property lying in another state, the administration account respecting the property there cannot be allowed by the judge of probate here, against the interest in this state.**

APPEAL from the judgment of the Court of Probate in the settlement of said executor's account for the following reasons, 1st. Because said executor is allowed a large sum for repairs upon the buildings, etc. of the deceased, and is charged nothing for the rents and profits of the estate while

he had the improvement of it for the space of about four years. 2d. Because he is allowed a large sum for expenses in and about groundless law suits. 3d. Because he is allowed the sum of £158 12s. 10d. lawful money for services and expenses, as administrator on the estate of said Charles in the districts of Thetford and Hartford in the state of Vermont, in selling lands lying in said districts, under the orders of the Courts of Probate there; which lands worth £1,800 he sold for £65 6s. only, with intent to defraud said creditors; which account of his administration ought not to have been brought and allowed against the estate of said Charles by the Court of Probate in the district of Windham in this state. 4th. Because said executor has allowed nothing for the use of the stock of cattle, the increase, nor for the use of other personal property. 5th. That said estate was inventoried at more than £4,000 lawful money, which after four years' possession and improvement without account he sold for £1,296 9s. lawful money only, out of which is allowed £464 6s. 11d. to the executor for his services and expenses, when the use and improvement of said estate taken by said executor, without accounting for them, exceed the whole amount of his services and expenses.

Appellee replied to the reasons of the appellants aforesaid and said that they are not true. Issue to the court.

The court gave the following judgment, viz. In this case the court find that the judge of probate did not make the said Jared account for the rents and profits of the real estate of said Charles, from the time of his accepting the office and trust of executor aforesaid, and while said estate was in the hands and possession of the heirs of said Charles, until it was represented insolvent; and that the judge of probate did allow the said Jared £158 12s. 10d. lawful money for moneys by him expended and services done as administrator on the estate of said Charles in the two districts of Hartford and Thetford, both in the state of Vermont, out of the jurisdiction of this state, which estate of said Charles consisted of lands; that said

Jared took two letters of administration, one from the court in each district, and sold the real estate of said Charles lying in said state of Vermont according to the laws of that state, for the sum of £65 6s. only, and said Jared's administration account aforesaid exceeded the sum said real estate was sold for the sum of £93 6s. 10d., and the same was allowed to him in his account as executor, in the settlement of said estate.

And the court further find that the Court of Probate did allow to the said Jared in the whole, the sum of £464 6s. 11d., including said sum of £93 6s. 10d., the balance of his administrator account in the state of Vermont — Which facts the court find are true: But on consideration thereof are of opinion that they are insufficient reasons for which to set aside the said orders and judgment of said Court of Probate.

And as to all the rest and remainder of the facts set up and alleged in the reasons of the appellants exhibited to this court, they are not supported by evidence and the court find them not to be true. It is thereupon considered that the doings, orders and judgments of the Court of Probate be and they are hereby affirmed.

From this determination of the court with respect to allowing the administration account for the sale of lands in the state of Vermont, Judge ADAMS dissented; and ROOT having heretofore been attorney in the cause excused himself from judging.

The judgment of the Superior Court was reversed upon a writ of error, in the Supreme Court of Errors, in May, A. D. 1793, for the following reasons, viz.

First — The act of allowing an administration account is the proper official act of the judge of probate, or other officer who grants administration; the administrator is related to the judge as his agent, minister or substitute, to transact the business committed to him under his immediate inspection on account of that relation. The judge is every way qualified to decide with integrity and justice on his accounts, but the

judge of probate has no authority as judge to allow the accounts of any other person whatever against the estate of a deceased person.

The administrator in the present case, is a stranger to the judge of probate for the district of Windham; nor has the judge any power to inspect, order or control the said administrator as his minister or agent, but he is accountable to the judges that appointed him, and they alone have authority to allow his accounts. The administration being committed to the executor in this case makes no difference, for the trusts are as perfectly distinct as if they had been placed in different persons, and consequently the accounts of Jared Hinkly as administrator, cannot be considered nor treated as the accounts of Jared Hinkly as executor, in which character alone is he related to the judge of probate for Windham district.

It will be admitted that if one administrator can charge another administrator, or an executor on the same estate in a different jurisdiction, with any part of his administration account being allowed by the judge who appointed him, then such executor or administrator so charged, might voluntarily take such charge upon himself; or in the present case, Jared Hinkly as executor in the jurisdiction of Connecticut might take upon himself the charge of Jared Hinkly as administrator in the jurisdiction of Vermont, and the judge of probate for the district of Windham might in that case allow the same to the executor's credit, but the principle that such a charge can be supported cannot be admitted. For such administrator or such executor and administrator in different jurisdictions, if they can be created by law, and can exist at the same time, are wholly independent of each other, nor is there any privity between them, that can create a liability in the one to the other: Nor is there either precedent, or example, that can be produced, it is believed, in proof of the point that one representative of a deceased person can maintain an action against another co-existing representative of the same deceased person.

The question relating to the power of executors and administrators, is so important, as it respects the execution of their trust, and the community, that it ought to be clearly defined and understood.

As I did not judge in this case, I think that from the law and the reasonings of the court upon it, it is clear, that the several Courts of Probate in this state are invested with complete jurisdiction, within their respective districts; of the probate of wills, of granting letters of administration, of appointing guardians to minors, of inventorying and making distribution of the estates of deceased persons who lived and died within their respective districts. That the probate of wills or letters of administration, under the seal of the Court of Probate, are a sufficient authority for the executor or administrator to collect the debts and to dispose of the personal estate of the deceased, throughout this state, and the United States; and what they receive is to be added to the inventory, and an account thereof rendered to the Court of Probate under whose authority they act, to be settled by him. They have also authority to sell real estate, lying at any place within this state, if necessary, by the order of the Court of Probate.

Real property lying in another state or jurisdiction must be proceeded with and disposed of by authority from, and according to the laws of the state or jurisdiction, in which such estate lies. If the estate is solvent, the executor or administrator will have very little to do with it, as they cannot sell it, the heirs or devisees will look after it. If the estate is insolvent, then it becomes the interest of the creditors, that it should be sold for the payment of the debts; and it may be a question of prudence, upon which the creditors ought to be consulted, whether the estate will answer the cost of going after it, of taking out letters of administration, and going through the forms of law in another state for the purpose of selling it and turning it into money.

As the executor or administrator is a mere trustee for the creditors, this ought not to be at his risk and expense, provided he conducts with discretion, but of the creditors for

whose benefit they act. The administrator appointed by the court must make his return to the court that appointed him, and settle his administration account there; who will allow out of the avails of the estate what he shall judge to be reasonable for his trouble and expense; and the net proceeds of the estate paid and delivered over into the hands of the original executor or administrator as so much personal estate, which it is their duty to add to the inventory, on which the average shall be made out to the creditors.

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**NEW LONDON COUNTY, MARCH TERM, A. D. 1792.**

WILLIAMS v. HALSEY.

**In an action on bond with conditions, if the defendant pleads performance generally, and the plaintiff assigns a breach in particular — and the defendant affirms he has performed in the particular assigned as a breach — if the plaintiff demurs, judgment must be for the defendant.**

ACTION of debt on bond for £200 dated the 30th of April 1789.

The defendant plead in bar — That having prayed oyer of said bond, and the same being read it had the following conditions, viz. Whereas said Williams sometime passed gave bond jointly and severally with Joseph Woodbridge, who is confined in gaol on an execution in favor of Michael Price, for £175 11s. 5d. lawful money, to the sheriff of said county, that the said Woodbridge, should abide a faithful prisoner on said execution, etc. and whereas the said Halsey hath agreed with the said Williams to take the one-half of the risk of said bond jointly with said Williams. Now if said Williams shall never be put to any cost or damage on account of his giving said bond; or if he shall finally become obliged to pay the same; and then the said Halsey shall pay to said Williams the one-half of the sum that shall be recovered against him, and half of the cost arising thereon, then said obligation is to be void. And the defendant says that he hath at all times kept and performed the condition of said bond.

The plaintiff replied — That soon after executing said bond the said Woodbridge put into the hands of the defendant an order on Robert Winthrop, for £100 lawful money, which was accepted and paid; also he put into his hands goods and merchandise to the amount of £175 lawful money, which were delivered by said Woodbridge, and received by said Halsey, for the purpose of paying said debt to said Price, and indemnifying said Williams and said Halsey, against their said bond: That the defendant regardless of his duty converted said money and goods to his own use; and that the plaintiff hath been sued on said bond to the sheriff, and judgment recovered against him, for £200 which he has been compelled to pay, and the defendant has paid no part thereof.

The defendant rejoined — That before the date of the plaintiff's writ he made full payment of one-half of the debt and cost recovered by the sheriff against the plaintiff on said bond. Plaintiff demurred.

Judgment — That the rejoinder of the defendant is sufficient.

By the COURT. The defendant in his plea and rejoinder directly avers, that he has kept and performed the condition of said bond and hath in fact paid one-half of the debt and cost recovered by the sheriff against the plaintiff, on said bond, which by the demurrer is admitted. And the plaintiff's replying, that the defendant had received of said Woodbridge money and goods for the purpose of paying said debt, which he had not applied, only shows that the plaintiff or said Woodbridge may recover against him in some other action for said money and goods, but cannot give the plaintiff a right to recover in this action.

## LAMB V. SMITH ET UX.

**Interest recovered on a legacy, which was ordered by the testator to be put upon interest.**

ERROR to reverse a judgment of the County Court, in an action brought by Smith and wife against Lamb, declaring that David Lamb on the 6th of July A. D. 1771, made his will and gave to his two sons John and the said Lemuel, all

his estate after the decease or second marriage of his wife, to be divided as follows, viz. etc. to Betsey, the wife of said Sharp Smith, a legacy as follows, *Item.* I give and bequeath to my negro woman Betsey, her freedom in six months after my decease. I also give to said negro woman Betsey, £12 lawful money, to be put to interest under the care of the Rev. A. Rosseter and to be by him dealt out to said Betsey's use, at his discretion, as her circumstances shall require, to be paid equally by my sons Lemuel and John Lamb, within one year after my decease. The testator died in October A. D. 1771 and said will has been duly proved and approved, and the defendant accepted of said estate given him by the will aforesaid, which was worth £800 lawful money, and thereupon he became liable to pay one-half of said legacy given to said Betsey in said will and being so liable assumed and promised to pay said half being £6 and the interest thereon, from and after one year from the death of the testator, etc.

To this declaration a general demurrer was given, and the County Court gave judgment that the declaration was sufficient and for the plaintiffs to recover the sum of £12 19s. 6d. damages and cost.

Errors assigned — 1st. That the declaration was insufficient. 2d. That said court gave too great a sum in damages.

Judgment of the County Court affirmed. The legacy is given to said Betsey to be paid by the defendant and said John in equal moieties within one year after the decease of the testator, and to be put upon interest; if they neglected to pay it by the time they ought to pay the interest. Mr. Rosseter was appointed by the will a kind of superintendent or guardian to said Betsey as to this legacy, but had no kind of interest in it. His accepting or refusing the trust can have no effect upon the negro woman's interest in it.

## CURTICE V. SCOVEL.

**An erroneous judgment upon a note being reversed revives the note.**

ERROR to reverse a judgment of the County Court in an action upon a note for £20, dated 11th of September A. D. 1790, brought by said Scovel v. said Curtice.

To which action the defendant plead in bar, that said note was executed and delivered into the hands of Joseph Isham, justice of the peace, for the sole purpose of confessing judgment upon to the plaintiff; which said justice was to take and make a record of which was accordingly done and said judgment was left in the hands of said Isham, Joseph Williams and William Hubbard arbitrators between said parties for them to dispose of to oblige the said Curtice to abide and perform the award they should make; and that execution should issue for the sum awarded for him to pay and no more; and that judgment has been rendered upon said note and the same is not obligatory upon him.

The plaintiff replied, that said note was delivered to the plaintiff for the purpose of securing the performance of the award said arbitrators should make, and a judgment was confessed upon it before said Justice Isham for that purpose, by the defendant; and said arbitrators made and published their award in the premises pursuant to their instructions, in which they awarded the said Curtice to pay to said Scovel £17 11s. 6d. in full of all demands, which the defendant had never performed — and the defendant by a writ of error, had procured the judgment of Justice Isham by confession on said note, to be reversed and set aside, and thereupon said note was delivered to the plaintiff to take benefit of and enforce a performance of said award by the defendant, for which purpose it was executed.

The defendant rejoined and affirmed over his plea and traversed without that that said note was made, executed and delivered to the plaintiff to enforce a performance of the award said arbitrators should make in the matters submitted.

And the plaintiff sur-rejoined and affirmed that it was executed and delivered to the plaintiff for the purpose of securing a performance of the award said arbitrators should make. On which the parties were at issue to the court.

The court found that the defendant did execute and deliver said note to the plaintiff for the purpose of securing a performance of the award said arbitrators should make, and that judgment was confessed upon it, which had since been reversed, as the plaintiff in his reply and sur-rejoinder had alleged and that the plaintiff recover, etc.

Errors assigned — 1st. That the plaintiff's reply and sur-rejoinder were insufficient. 2d. That said County Court mistook the law.

Judgment of the County Court affirmed. The reversing of the judgment of the justice upon said note for error, placed said note in the same situation it was before any judgment was rendered upon it; which the County Court have found to have been made and delivered for the purpose of enforcing a performance of said award.

MONROE ET UX. V. MAPLES ET AL.

**Husband and wife cannot join in an action for an injury done to the husband.**

ACTION of the case, declaring that the defendants conspired together and caused the plaintiffs to be prosecuted falsely and maliciously, for aiding and assisting one Valet to commit an assault and rape upon the body of M. Maples, etc. etc. whereby they were put to great trouble, vexation and cost, to their damage £560.

Plea in abatement — That husband and wife cannot join in an action for an injury done to the husband as well as the wife, but for that he must have an action by himself.

Judgment — Plea in abatement sufficient.

HUNTINGTON, JUDGE OF PROBATE, v. MOTT.

**Interest allowed on an administration bond against the bondsman.**

ACTION upon an administration bond, defaulted, heard in damages. The creditor had recovered judgment against the administrator upon a *scire facias* and had execution to be levied and satisfied of his proper goods, etc. which execution had been returned *non est.* The creditor claimed interest upon his debt from the time of the judgment on the *scire facias.*

By the COURT. Interest is to be computed from the end of sixty days from the date of said execution, upon the ground that the bondsman comes in the place of the administrator, who in consideration of law has had the use of the money.

TOWN OF LISBON v. TOWN OF FRANKLIN.

**Residing in a town more than one year, under certain circumstances, will not obtain a settlement.**

ACTION of the case for supporting one Hannah Tracy and her children, the wife of Samuel Tracy, whom the town of Franklin, on the 15th of December A. D. 1791 caused to be transported to said town of Lisbon, demanding £25 damages. Plea — Not guilty. Issue to the court.

The state of the case was — Said Samuel Tracy was born in that part of the ancient town of Norwich, which now was Franklin. Some years before A. D. 1786 he removed to that part of said ancient town, which now was Lisbon, and resided there two or three years. In A. D. 1785 he removed to the town of Mansfield; in A. D. 1786 the ancient town of Norwich was divided by act of the general assembly into four towns, viz. Norwich, Franklin, Bozrah and Lisbon. In April A. D. 1787 said Samuel returned from Mansfield, not having gained a settlement there, to the town of Franklin, and there resided more than one year without being warned. In June A. D. 1790 he removed to Walpole in the state of New Hampshire and returned in September A. D. 1791 without having gained a settlement there. The act of assembly dividing the ancient town of Norwich, is that Frank-

lin, Lisbon and Bozrah shall take to themselves and maintain their proportion of the poor people, now supported or assisted by said town of Norwich, and shall receive and acknowledge their proportion of those inhabitants of said town of Norwich, who now dwell in other places by permission, certificate or otherwise, and shall be hereafter returned as legal inhabitants of said ancient town of Norwich, and shall bear their proportion of the expenses which shall arise on such inhabitants when returned as aforesaid.

The poor of said ancient town who were returned after the division aforesaid, were supported at the common expense of all the towns, according to their several proportions, until the 20th of January A. D. 1791, when the ancient town of Norwich, comprehending all said new towns, voted and agreed, that the inhabitants of said ancient town who were absent, out of it at the time of said division, viz. in May A. D. 1786, should be inhabitants of such town or towns, within the limits of said ancient town, which now comprehends the place of their last residence, before said division. On the 15th of February A. D. 1791, the town of Lisbon voted to accept all such inhabitants of said ancient town, who were absent as aforesaid at the time of said division, and whose last place of residence in said ancient town, was within the limits of said Lisbon, and had not gained a settlement in any other town; that said Tracy's wife, etc. became chargeable and was removed by order of said town of Franklin to Lisbon.

The court found that the defendants were not guilty and gave judgment for them to recover their cost, upon the principle that although said Tracy dwelt in the town of Franklin more than a year, without warning, after he returned from Mansfield in April A. D. 1787; yet during the whole of that time, he was considered as one of the poor of said ancient town and supported at the common expense of all the towns, and so not in a situation to be removed or to gain a settlement by commorancy; and his last place of residence in said ancient town, before the division, was within the limits of the present town of Lisbon.

MOTT v. DOWNER.

**A party will not be allowed to alter his plea, where it is not relevant to his case.**

ACTION of account. Plea — Not bailiff and receiver. Issue to the jury.

The defendant offered to go into the particulars of the account, thereby to prove that he was nothing in arrear; but not allowed by the court; he then moved to alter his plea, and plead that he had fully accounted in order that he might show that he was not in arrear.

By the COURT. The alteration cannot be permitted for the reasons suggested; for it is the proper business of auditors to examine and adjust the accounts, which the court and jury never undertake to do, in an action of this nature.

BRATTLE v. GUSTIN, ADMINISTRATOR OF THOMAS GUSTIN.

**The denial of the Court of Probate to grant administration *de bonis non*, disaffirmed.**

APPEAL from probate. Said Thomas died, his son, the appellee took administration on his estate, represented it insolvent, and had commissioners appointed, who found and reported only £9 to be due from said estate; the appellee being heir to his father sold said estate, became bankrupt and absconded: Brattle being at Nova Scotia when these transactions took place, did not exhibit his debt to said commissioners; upon his return into the United States, he sued said administrator and recovered a judgment for his debt, alleging that there was a plentiful estate of said deceased to pay said debt; and moved said Court of Probate to recall said letters of administration granted to the appellee, and to grant administration *de bonis non*, to Roger Griswold, Esq. upon the estate of said Thomas, deceased; which said Court of Probate refused to do from which this appeal was taken, and the order of probate disaffirmed without cost.

STORER v. PRENTICE.

**Value of public securities estimated at the time when payable.**

ACTION on note for £107 state securities, payable on the 15th of July, A. D. 1791. Defaulted — The securities set

at fourteen shillings on the pound, the value at the time when payable.

WILLIAMS v. STANTON ET AL.

**An accord not executed no bar to an action upon a receipt.**

ERROR to reverse a judgment of the County Court in action brought by said Williams, as a deputy sheriff, against said Stanton et al. declaring upon a certain receipt executed by the defendants, wherein they acknowledge the receipt of a quantity of goods taken by the plaintiff upon an execution in favor of the state, against one Rathbone et al. which goods they promised to deliver to the plaintiff at the sign post at the end of twenty days; alleging that the defendants had not performed their promise.

Plea in bar — That it was accorded and agreed by and between said Rathbone, one of the debtors in said execution, and the plaintiff; that if he would deliver to the plaintiff at the sign post twenty-five pieces of chintz, and bid £15 for them; and pay him his fees, the plaintiff would accept thereof in full satisfaction for his part of said execution; said execution being for £40, averring that said Rathbone tendered said twenty-five pieces of chintz to the plaintiff at said sign post, and also his fees, and offered to bid £15 for them, all which the plaintiff refused to receive.

The plaintiff traversed the plea in bar, upon which the parties were at issue to the court; the court found the facts as set forth in the plea in bar, and gave judgment for the defendants their cost.

Error assigned — That the issue was immaterial; that judgment ought to have been for the plaintiff.

Judgment — Manifest error; for the reason assigned in error; an accord or executory agreement, not executed can be no bar to the action upon the receipt.

PETITION OF RUTH BUTLER, AN INSANE PERSON, BY HER OVERSEER APPOINTED BY THE SELECTMAN.

IT was determined by the court — That an insane person is not a proper subject to have an overseer appointed by the selectmen; but the law provides that such persons shall have a conservator appointed by the County Court.

MIDDLESEX COUNTY, JULY TERM, A. D. 1792.

Hon. ELIPHALET DYER, Esq., *Chief Judge.*

*Judges.*

Hon. ANDREW ADAMS, Esq., Hon. CHARLES CHAUNCY, Esq.,
Hon. JESSE ROOT, Esq., Hon. ERASTUS WOLCOTT, Esq.

S. TITUS HOSMER, ESQ., ADMINISTRATOR ON THE ESTATE OF GENERAL PARSONS, v. MERRIAM.

**In an action brought by an administrator on an insolvent estate on a note, against a creditor to said estate by book, the court will offset the sum found by the commissioners to be due on book against the note, and give judgment for the remainder.**

ERROR to reverse a judgment of the County Court in an action brought by said administrator against said Merriam, on a note of hand, dated the 29th of January, A. D. 1787, for £19 13s. 4½d. payable to said General Parsons by the 1st of November then next, with the lawful interest; demanding £30 damages.

Plea in bar — That the estate of said Parsons was represented and found to be insolvent; that said Merriam exhibited to the commissioners appointed to examine the claims of the creditors, a debt due to him, by book from said Parsons of £11 6s. 1d.; which was allowed by said commissioners, in their report to the Court of Probate; which in contemplation of law is a payment of so much on said note, and ought to be offset accordingly; and for the residue of said note the plaintiff ought to recover. The plaintiff demurred.

The County Court gave judgment that the plea of the defendant was sufficient, for the sum of £11 6s. 1d., and that the plaintiff recover for the residue of the note.

Errors assigned — 1st. That the commissioners did not make the offset. 2d. That the allowance of said debt by the commissioners, was not conclusive upon the administrator. 3d. It does not appear that said articles charged on book were delivered in payment of said note. 4th. That the County Court as a court of law, was incompetent to make the offset.

Judgment — That there is nothing erroneous in the judgment complained of.

By the COURT. The balance of claims in such cases where mutual credit is given is the sum due. The commissioners on an insolvent estate will allow and report the debt; which must be offset by the court in the action against the creditor, where he owed the deceased more than the deceased owed him, for it would be inequitable, that the administrator should recover the whole sum against the creditor, and the creditor take only the average upon his debt; and the administrator is at liberty to contest in this action, the allowance made by the commissioners. See Hosmer v. Brattle, Haddam, December Term, A. D. 1791.

## HOWARD v. MILLER.

A *scire facias* against the sheriff's bail must be brought within twelve months from rendering the judgment.

ERROR to reverse a judgment of the County Court, in a *scire facias*, brought by Miller v. Howard; declaring, that the plaintiff prayed out a writ of attachment against Benjamin Howard, Jr. of Providence, in the state of Rhode Island, dated the 27th day of March, A. D. 1788, returnable before the County Court holden at Middletown, in Middlesex county, on the second Tuesday of November A. D. 1788; by which the body of the said Benjamin, Jr. was attached, and said Benjamin Howard gave bond in the sum of £60 to the sheriff, to be paid upon condition, that said Benjamin, Jr. should fail to appear before said County Court and answer to said suit; that said writ was duly returned, and said action was continued to the County Court holden at Haddam in said county on the first Tuesday of April, A. D. 1789; when and where said Benjamin, Jr. made default of appearing, and judgment was entered against him in said action; for the plaintiff to recover the sum of £16 7s. debt and cost; that execution was taken out on said judgment for the sums contained therein, dated the 20th of April, A. D. 1789, and delivered to a proper officer to serve, etc. who made return thereof with his indorsement thereon, dated the 16th of June,

A. D. 1789; that he had made diligent search within his precincts, but could find neither person nor estate whereon to levy said execution, etc. and that said judgment and said bond remained unsatisfied and unpaid: Further alleging that said Benjamin, Jr. brought a petition for a new trial in said cause to the County Court holden at said Middletown on the second Tuesday of November A. D. 1789; which was continued by the procurement of said Benjamin Howard, to the adjourned court in December A. D. 1790, when it was negatived; praying for a remedy against the bail; writ dated the 1st day of March, A. D. 1791.

Plea in abatement — That a *scire facias* did not lie on a sheriff's bail bond. Judgment — Plea insufficient.

The defendant then plead in bar — That more than twelve months had elapsed, from the time of rendering final judgment in said action, to the date and impetration of the plaintiff's *scire facias*, and by the statute entitled an act concerning bail in civil and criminal causes, the plaintiff was barred. Demurrer to the plea.

Judgment of the County Court — That the defendant's plea was insufficient.

Errors assigned — 1st. That a *scire facias* doth not lie on a sheriff's bail bond. 2d. That the County Court ought to have adjudged said plea in bar sufficient, and given judgment for the defendant to have recovered his cost.

Judgment — Manifest error; for the last reason assigned. The court made no decision upon the first. The statute is peremptory that the suit against the bail must be brought within twelve months, and not after; and the petition for a new trial and continuing it along in court, was no bar to the plaintiff's suing out his *scire facias*.

## Bow v. Sheriff Parsons.

**A juryman may not converse with other people, not of the jury, nor suffer them to converse with him about the cause under consideration.**

Action for the escape of Gordon Whitmore from gaol, who was in prison upon an execution for £57 14s. 4d. debt and £24 4s. cost. The defendant plead that he had made full

payment of the execution before the date and impetration of the plaintiff's writ. Issue to the jury.

The jury found a verdict for the plaintiff and £79 16s. 5d. damages.

The defendant moved in arrest of judgment — That one of the jurors who tried said cause, after it was committed to the jury and while they had it under their consideration, conversed freely with several persons, not of the jury, about said cause, and suffered them to converse with him about the same. The facts being denied, the court upon inquiry of the evidence found them to be true, set aside the verdict and ordered a repleader.

This was a direct violation of the oath of the juryman, which is the principal guard placed upon jurors in this state, although the law requires that they should be kept confined by an officer until they are agreed in a verdict; yet it has ever been practiced for the jury to adjourn and disperse to their quarters, and if they are suffered to enter into conversation respecting causes they have under consideration, with persons not of the jury, the purity of trials by jury would be perverted and corrupted, therefore the most vigilant attention is required. See Dana v. Roberts, Hartford September A. D. 1789.

RUSSEL LORD, ADMINISTRATOR OF SAMUEL LORD, v. BENJAMIN AND AUSTIN WATERHOUSE, EXECUTORS OF GIDEON WATERHOUSE.

Money extorted by an unlawful execution, shall be considered a payment of the debt.

ERROR to reverse a judgment of the County Court in an action brought by said Russel, administrator aforesaid, against said Benjamin and Austin, executors aforesaid, upon a note given by said Gideon to said Samuel for £16 13s. lawful money, payable on demand with interest, dated the 1st of June A. D. 1774. Demanding £30.

Plea in bar — That having prayed oyer of said note it hath the following indorsements, viz. recites them, among which is one in these words, judgment obtained on the above note June 10, 1790, before me Thomas Silliman, justice of the

peace; and the defendants say that the plaintiff sued them on said note before Justice Silliman, and declared upon said note as given to Samuel Lord, Sr. and having indorsed it down to £6 he recovered judgment against them upon said note before said justice for £5 14s. 5d. lawful money damages and eight shillings three pence cost; upon which judgment the plaintiff afterwards prayed out an execution on said judgment by Elijah Waterhouse assignee of said note for the sums therein contained, against the proper goods and estate of the defendants and for want thereof to take and imprison their bodies — which execution was delivered to William Warner, constable, and on the 17th of August 1790, said Austin paid said execution to said constable and the same was indorsed, satisfied and the money paid over to the plaintiff.

Plaintiff replied — That said Elijah Waterhouse, when he delivered said execution to said constable, directed him to levy it on the body of said Benjamin Austin if estate was not to be found, and said constable did levy said execution on the body of the said Austin and held him four days, and was about to commit him to prison, and said Austin to avoid being imprisoned, paid said execution to said constable, who paid the same to said Elijah; that said execution hath been no otherwise paid, and that said Austin afterwards commenced his action against said Elijah for said wrongful imprisonment to the County Court, held on the second Tuesday of November 1790, alleging therein that said Elijah held him as aforesaid until he paid £15 lawful money for his release, demanding £50 damages; which cause was appealed to the Superior Court, before which said Austin recovered in said action £9 lawful money damages and his cost; which judgment has been duly paid and satisfied.

The defendant rejoined — That said Russel Lord recovered judgment against said Benjamin and Austin as executors aforesaid upon another note, which was assigned to said Elijah for the sum of £3 16s. 10d. damages and cost five shillings and eleven pence, before Justice on the 28th of May A. D. 1790. Also a judgment on book for £1 16s. debt and eight shillings and five pence cost; on both which judgments said Elijah took out executions in the name of said Russel

Lord as aforesaid, for the sums therein contained; which executions were against said Benjamin and Austin, executors aforesaid, to levy of their own proper estate, and for want thereof to commit their persons to prison; both which executions were by the direction of the said Elijah, levied by said Constable Warner, on the body of said Austin with said other executions on said 13th of August A. D. 1790; and to prevent his being committed to prison, the said Austin on said 17th of said August paid all three of said executions to said Constable Warner, which by him was paid over to said Elijah, the assignee of said debts; and the jury in the action of false imprisonment brought by said Austin against said Elijah aforesaid, did not allow or assess any damages for the money paid as aforesaid, but gave damages only for the special injury. The plaintiff demurred.

Judgment of the County Court — That the defendants' rejoinder was sufficient.

Errors assigned — 1st. That the note on which, etc. and the note on which said former judgment was recovered, doth not appear to be the same. One was given to Samuel Lord and the other appears to have been given to Samuel Lord, Sr. 2d. That the money taken upon said execution was unlawfully and tortiously taken and cannot be considered as a payment. 3d. That said justice had no jurisdiction to render judgment on said note, it being for £16 13s.

Judgment of this court — That there is nothing erroneous in the judgment complained of. It doth not appear but that Samuel Lord and Samuel Lord, Sr. are one and the same. The note by the plaintiff's declaration appears to have been indorsed down to a sum within the justice's jurisdiction. It also appears that no part of the money paid upon the executions was recovered back in the action of false imprisonment, but special damages only for the injury; and it is incompetent for the plaintiff to say, that the money the defendants paid him on the executions shall not avail them as a payment, because he extorted it from them in an illegal and tortious manner.

## Lewis v. Niles.

**Where, in a declaration for slander, some of the counts are insufficient, and there is a general verdict for the plaintiff and entire damages given, the court will not arrest the verdict.**

Action of defamation. The declaration contained several counts for several sets of words, some of which were sufficient and some were insufficient. The defendant plead not guilty generally to the whole. Issue to the jury.

The jury found the defendant guilty and gave damages.

The defendant moved in arrest of judgment, that several of the counts in the declaration were clearly insufficient, and as the verdict was general, it did not appear to the court but that the defendant was found guilty and the damages given upon the insufficient counts only.

By the Court. The motion is insufficient, for it is not to be presumed that the jury founded their verdict upon the insufficient counts; and as there are several counts in the declaration, which are well and sufficiently alleged, it contains substantial grounds to entitle the plaintiff to judgment; besides, the defendant might have demurred to the insufficient counts. The rule laid down in the books, as adopted in Great Britain to the contrary in civil actions, appears not to be founded in good reason, although the same rule in criminal actions doth not hold, (for in those if any one of the allegations is sufficient, the defendant is holden) yet the reason is the same in both civil and criminal prosecutions.

NEW HAVEN COUNTY, JULY TERM, A. D. 1792.

BENEDICT ET AL., ADMINISTRATORS OF GEORGE NICHOLS, DECEASED, v. JOHN NICHOLS.

In an action of account by the administrators, the examination of the defendant respecting the concealment of the deceased property, may be given in evidence against him, but the whole must be taken together.

A defendant who has missed his plea may have liberty to alter it, although the cause is on trial to the jury.

ACTION of account for sundry articles of goods, etc. which belonged to the estate of said George deceased, of which he was bailiff and receiver from January A. D. 1784 to September A. D. 1788; to part of said articles the defendant plead that he was never bailiff and receiver, and as to the rest that he had fully accounted. Both issues were put to the jury.

The plaintiffs had cited the defendant before the Court of Probate to be examined upon oath touching certain property of the deceased, concealed in his possession, pursuant to the statute in such case provided, and offered to give evidence of what the defendant confessed upon that examination.

By the COURT. That examination was officially taken and may be given in evidence, but is not to be proved by parol testimony.

The plaintiffs then read that part of the examination which showed that the defendant had received the goods of the deceased and objected to reading the other part, whereby it appeared that he had accounted for them.

By the COURT. The whole must be taken together.

The defendant finding on trial, that some of the articles charged in the declaration, to which he had plead fully accounted, never existed, he moved for liberty to alter his plea as to them, and plead that he was never bailiff and receiver.

The court admitted it to be done, notwithstanding the case was on trial to the jury. See Riply v. Fitch, Windham, March Term, A. D. 1792.

COOK AND WOODRUFF v. ATWATER.

**The issue either of law or fact, joined and put to the court, must be answered explicitly.**

ERROR to reverse a judgment of a justice, in an action of *indebitatus assumpsit*, brought by said Atwater v. Cook and Woodruff, for thirty-seven shillings.

Plea in bar — That said Woodruff had an execution against Granniss and Norton of Arlington, in the state of Vermont, which he delivered to said Cook to levy and collect, he being an officer; that said Cook levied said execution on a certain horse of said Granniss's on the 30th of September and posted him to be sold at the end of twenty days; that the plaintiff and said Granniss applied to said Cook and requested him to deliver said horse to the plaintiff to keep, and to accept a silver watch as security for the return of said horse to be sold at the end of twenty days, which request was complied with, and on the 19th of said October the plaintiff and said Granniss came to said Cook and the plaintiff took back his watch and paid said execution, which was thirty-seven shillings, which said Cook, upon the request of the plaintiff, indorsed upon said execution, and is the same thirty-seven shillings mentioned in the plaintiff's declaration to have been received by the defendants.

The plaintiff replied that said horse was his property, which the defendant took by said execution; that he pawned his watch to redeem him, and to secure the return of him at the end of twenty days; that on the 19th of October he requested of said Cook to deliver him his said watch, and also said horse; which he refused to do unless the plaintiff would pay said execution, being thirty-seven shillings, which he was compelled to do in order to obtain his said watch, etc. and for no other cause or consideration.

The defendants traversed the taking of the plaintiff's horse and his paying said money by compulsion in order to redeem said horse and watch and for no other cause, and demurred to the rest of the reply. The plaintiff joined issue with them upon the fact and upon the law.

The justice having considered of the cause gave judgment that the plaintiff recover of the defendants the sum of £1 17s. lawful money damages and cost.

Errors assigned — 1st. That an action of *indebitatus assumpsit* will not lie in such case. 2d. That said justice had not decided either of the issues of fact or law joined and put to him.

Judgment — Manifest error upon both points assigned in error; the justice ought to have decided both issues explicitly, and not by implication only. The action is for money had and received — the plea is that the money was received on a lawful writ of execution — the reply is that it was extorted by duress, but the facts stated do not warrant the conclusion.

LEAVENSWORTH V. TOMLINSON ET AL.

A *quitam* prosecution for the penalty of a statute, not a civil suit for the purposes of notice.

A former prosecution and acquittal a good bar to a second for the same cause, matter and thing.

ERROR to reverse a judgment of a justice in a *qui tam* prosecution, brought in the name of Tomlinson and the treasurer of the town of Derby, complaining that said Leavensworth on the 30th of April last past, did, after the sun rising on Saturday morning and before the sun setting on Monday evening, draw a seine for the purpose of catching fish in Ousatonick river, at Derby, etc. contrary to the statute, entitled an act for encouraging and regulating fisheries, whereby he had forfeited the sum of £ one-half to the prosecutor and the other to the town treasurer; complaint dated May 17th A. D. 1791, upon which a warrant issued and the defendant was arrested and had forthwith before said justice to answer to said complaint.

The defendant plead in abatement, that said process was in nature of a civil suit upon the statute for the penalty, in which six days' notice ought to have been given. Judgment, that the plea was insufficient.

The defendant then plead in bar, a complaint exhibited against him by Jabez Lake, Jr. to Justice Hotchkiss (recites

the complaint) whereby it appears to be for the same facts, committed at the same time and place — upon which a warrant issued and he was arrested and had before said justice to answer to said complaint — to which he plead not guilty, and upon a full hearing upon the merits, said Justice Hotchkiss gave judgment that the defendant was not guilty, etc. averring that this complaint was for the same cause, matter and thing for which he had been legally tried and acquitted.

The plaintiff replied, that after he had exhibited this his complaint to said justice on said 17th of May, the defendant procured said Lake to bring forward said pretended suit against him before said Justice Hotchkiss, and to summon witnesses who were wholly ignorant of the facts, which he accordingly did; that there was no other prosecution brought against him and that the same was a sham judgment, obtained fraudulently to defeat the law. To this reply a demurrer was given.

The justice gave judgment — That the defendant's plea in bar was insufficient and for the plaintiff to recover, etc.

Errors assigned — That the justice ought to have given judgment, that the plaintiff's reply was insufficient, and for the defendant to have recovered his cost, and for this and other errors apparent in the record, he prays said judgment may be reversed.

Judgment — Manifest error; the judgment is irregular in point of form, and erroneous in point of substance; the reply admits the process and judgment set forth in the plea in bar, but the plaintiff hath not set forth facts in his reply with sufficient certainty, to render said judgment fraudulent and void.

A motion was made that the justice might amend his record, but not having any documents to amend by, it was not permitted.

HOTCHKISH v. TUTTLE.

**In a prosecution upon the statute, for damage done in the night season, the facts and the defendant must be directly charged in the complaint.**

ERROR to reverse a judgment of a justice in a prosecution, *qui tam*, upon the statute against unseasonable night walking, brought by Tuttle against Hotchkish; complaining, that in the night season of the night next after the 30th of August last, he had fifty watermelons taken from him; and that he had good reason to suspect that Ambrose Hotchkish was the person who did said damage, etc. praying process against him. To which complaint the defendant appeared and plead not guilty. The justice found him guilty and gave judgment against him, for £1 16s. damages, and that he should pay a fine of ten shillings lawful money.

Error assigned — That said complaint was insufficient.

Judgment — Manifest error. See the case of Tracy v. Larabee, adjudged at New London, March Term, A. D. 1791, and affirmed in the Supreme Court of Errors.

PORTER ET AL. v. WARNER.

**In an action of ejectment for land and damages, both must be demanded in the writ.**

ACTION of ejectment, that to the plaintiffs the defendant render the seisin and possession of a certain tract of land, of which the plaintiffs' ancestor was seized, in June, A. D. 1789, and of which the defendant disseized him, and ever since hath continued to disseize and hold the plaintiffs out therefrom, to their damage £40 lawful money, for recovery whereof and for cost they bring this suit.

Plea — Not guilty. Issue to the jury; who found the defendant guilty, and for the plaintiffs to recover the surrendery of the seisin and possession of the land demanded, with £ lawful money damages and cost.

Motion in arrest — That the plaintiffs' declaration was insufficient; because no demand was made of the land in the plaintiffs' writ; without which the court cannot give judgment for the land.

Judgment — That the motion in arrest is sufficient, but no cost allowed.

USTICK v. JONES.

**The court are not concluded by an entry of their clerk, which has no legal import or signification.**

ERROR to reverse a judgment of the County Court, in an action Ustick v. Jones, which action was duly entered in the docket; and in the course of calling, the clerk was informed that said cause was settled, upon which it was omitted to be called, and the clerk entered against it, done; in this situation it lay several days, when the defendant informed the court, that it was not settled and moved to have it called; that the suggestion of its being settled was a mistake; upon which the court ordered said cause to be called, and it was appeared in, and was adjourned with the court to January 1792; when a judgment was entered against the plaintiff upon a nonsuit, for the defendant to recover his cost.

Error assigned — That said action was discontinued and out of court and could not be revived.

By the COURT. There is nothing erroneous in the judgment complained of; it doth not appear that the action was discontinued, or out of court; the entry of the word, done, in the docket by the clerk, might be a memorandum which he understood, but has no legal import which can govern the court or the cause.

WAY v. CLARK.

**Where a writ is dated the 5th of December, 1791, to summon the defendant to appear on the 12th of December "next"—the word next, refers to the month, and is December A. D. 1792.**

ERROR to reverse a judgment of a justice; the writ was dated the 5th of December A. D. 1791, and summoned the defendant to answer to said action on the 13th of December next, and judgment was entered up by the justice on the 13th of December A. D. 1791, upon default; judgment was reversed, for next refers to the month which was December A. D. 1792; Nichols v. Lewis, same point adjudged upon a writ of error this court.

PORTER AND OTHERS, COMMITTEES OF FIVE ECCLESIASTICAL SOCIETIES IN WATERBURY AND WATERTOWN, v. BLAKELY.

**Selectmen and committees cannot maintain actions in their own names, for lands granted or sequestered to their respective towns or societies, for the use of schooling.**

ACTION of trespass against the defendant for cutting timber on land given to said societies for the use of schooling of which the plaintiffs alleged they were seized and possessed, as tenants in common. Plea not guilty. Issue to the jury; who found the defendant guilty.

The defendant moved in arrest of judgment — That by the plaintiffs' own showing it was not their land, but the land of the ecclesiastical societies which was trespassed upon.

The plaintiffs contended — That by the statute entitled an act for appointing and encouraging of schools, they were authorized and empowered to maintain the action in their own names and right.

The statute alluded to, is as follows, viz.— "That the selectmen of towns in which there is but one ecclesiastical society, and the society's committee where there are more than one society, for the time being, are empowered and directed to take care of all bonds, moneys, and lands, and all other estates that do belong to the schools in said towns and societies; and shall use and improve and dispose of the interest, profit and rents, arising on said moneys, lands, or other interest according to the true intent and meaning of the grant, gift or sequestration of them for the purpose aforesaid; and said selectmen, committee or committees, are authorized and empowered, to lease the lands and loan the moneys, belonging to said schools, and to commence and prosecute such suit or suits, as may be necessary for the recovery and obtaining of such lands, moneys, and other estate, etc."

The question was — Whether, where a town or society is disseized of lands, given or granted to them, for the use of schools, the action to recover the lands must be brought in the name of the town or society, or whether the statute enables the selectmen, or committees, to sue in their own names, and declare upon a seisin in themselves.

By the COURT. The committees have right by the statute to sue and prosecute, but it must be in the name of the town or society, to which the estate belongs, and so in an action of trespass the property must be alleged to be in the town or society. For this cause judgment was arrested, but no cost allowed.

This point was adjudged at the adjourned Superior Court in New Haven, December Term, A. D. 1772, in an action brought in the name of the school committees of the several ecclesiastical societies in the town of Waterbury, demanding surrender of seisin and possession of a piece of land, of which said town was seized in fee for the use of the schools, in said several societies.

Two exceptions were taken to this declaration under a general demurrer. 1st. That the legal estate was in said town, and the action ought to have been brought in the name of the town, and not in the names of the committees of said societies, to whom the use only belonged. 2d. That the committees of the several societies could not join in an action even for the use.

Judgment — That the declaration was insufficient, upon both exceptions.

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**FAIRFIELD COUNTY, AUGUST TERM, A. D. 1792.**

CURTICE v. BEARDSLY & MALLET.

**An issue which contains substance, though informal, after verdict, is good.**

ERROR to reverse a judgment of the County Court, in an action brought by said Curtice v. Beardsly et al. before a justice, and appealed to the County Court; wherein the plaintiff declared, that on the 13th of May, A. D. 1789, the defendants, by a certain note of that date promised the plaintiff to pay to him £44 lawful money, by the 1st of April, A. D. 1793, with the lawful interest annually, that one year's in-

terest had become due on said note, amounting to £2 12s. lawful money which the defendants had never paid, damage £ writ dated 13th of May, A. D. 1790.

Plea in bar — That said note was given to said Curtice, by said Beardsly and Mallet, jointly, with two other notes, one executed by said Beardsly, and one by said Mallet, separately, for a deed of land, executed by said Curtice to them; that soon after, viz. on the 11th of June, A. D. 1789, it was agreed between all said parties to throw up said bargain, and they redelivered to the plaintiff his said deed, unrecorded, which he accepted and the plaintiff delivered up to the defendants their separate notes given as aforesaid; but not having the note on which, etc. given by them jointly, with him, he declared that he would, and did, in consideration of having received back his said deed, absolutely discharge the defendants of and from any demand he had or might have against them by virtue, or on account of said note.

The plaintiff replied — Traversing all the facts alleged in the defendants' plea.

The defendants rejoined, by affirming their plea in bar; upon which the parties were at issue to the court.

The court found the facts alleged in the defendant's plea and rejoinder to be true, and gave judgment for the defendants to recover their cost.

Error assigned — That the issue was immaterial; that judgment ought to have been for the plaintiff to have recovered his just damages and cost.

The exception taken to the issue was — That the defendants had not set forth the discharge; but had only averred that the plaintiff did discharge them, and that the finding of the issue by the court could not help it.

By the Court. There is nothing erroneous in the judgment complained of; the plea contains matter sufficient to bar the plaintiff of a recovery; which is traversed by the plaintiff,

and by the court found to be true; and any defect in point of form is aided by the verdict, or the finding of the court. The plea affirms that the plaintiff did discharge the defendants which is a fact denied by the plaintiff, and found by the court; how it was made out and evinced this court cannot inquire.

NICHOLS ET AL. v. WHITING.

**In a plea of tender, of goods or other things upon an obligation, the articles tendered, must be described, so as they can be distinguished and known.**

ERROR to reverse a judgment of the County Court, in an action brought by said Whiting against said Nichols et al. upon a note dated the 11th of April, A. D. 1789, wherein the defendants promised to pay to the plaintiff £5 10s. lawful moneys' worth of shopwork, at their shop in Fairfield, at the appraisal of indifferent men, by the 1st of June then next.

Plea in bar — That on the 1st day of June, A. D. 1789, the defendants offered and tendered to the plaintiff, at their shop in said Fairfield, shopwork, such as chairs, bedsteads, etc. sufficient to pay said note at the appraisal of indifferent men at cash price, in payment and satisfaction of said note; and on the whole of said day they stood ready to deliver said shopwork, and did offer and tender the same, but the plaintiff did not come to receive the same, nor any person in his behalf.

The plaintiff traversed the defendants' plea, and the parties were at issue thereon to the jury.

The jury found that the defendants did not at their said shop, on said 1st day of June, offer and tender to the plaintiff, shopwork sufficient to pay said note, at the appraisal of indifferent men at cash price, in manner and form as the defendants in their plea had alleged, and for the plaintiff to recover.

Motion in arrest — That the jury have not found a material part of the issue, viz. that the defendants stood ready the whole of said day and offered and tendered said shopwork.

The County Court determined the motion in arrest to be insufficient, and gave judgment for the plaintiff to recover.

Errors assigned — That the County Court judged said motion in arrest insufficient, whereas they ought to have judged it to have been sufficient.

By the COURT. There is nothing erroneous in the judgment complained of; the plea in bar is insufficient, in that it doth not particularize the articles of shopwork tendered, whereby they could be distinguished and known. Otherwise the plaintiff would be barred of his action, by the tender, without being able ever to recover the articles tendered, for want of being particularly distinguished and described.

## WHITING v. M'DONALD.

**A special action of *indebitatus assumpsit* lies for public securities, which are mortgaged.**

ACTION of the case, declaring that on the 3d day of April A. D. 1787 he was indebted to the defendant £75 lawful money by note on interest, and to secure the payment of said note he delivered to the defendant three continental loan-office certificates, particularly described in the declaration, and worth £400 lawful money, for the defendant to hold and to redeliver to the plaintiff, upon his paying said note of £75; that on the 10th of October A. D. 1790, he tendered to the defendant £93 lawful money in payment of said note, which was in full of the sum due thereon with the interest, and demanded of the defendant said loan-office certificates, and the defendant refused to accept said £93 tendered, or to deliver up said certificates, and said money hath ever since been ready for the defendant; and that the defendant thereupon became liable to pay for said certificates what the same were reasonably worth, on the 12th of October A. D. 1790; and being so liable and indebted as aforesaid, he assumed and promised to pay to the plaintiff what said certificates were reasonably worth, which was not less than £400 lawful money; and that the defendant had never performed his promise, damage £400.

Plea — *Nonassumpsit.* Issue to the jury. The jury found that the defendant did assume and promise, and for the plaintiff to recover the value of the certificates, on the 12th of October when said tender was made.

Motion in arrest — That the plaintiff's declaration was insufficient.

Judgment — That the declaration is sufficient, and for the plaintiff to recover. June, A. D. 1794, affirmed in Supreme Court of Errors.

### Curtice v. Whipo.

**Public securities, payable on demand, estimated at the time of the contract.**

Action on note, dated 13th of May A. D. 1786 for £48 10s. 8d. in public securities, payable on demand. The defendant suffered a default, and upon a hearing in damages the court gave judgment for the value of the securities at the time of the contract, and set them at five shillings on the pound.

### Babbet v. Belding.

**Where the obligation is to return the securities on demand, or to pay for them on demand, makes no difference in the estimation of damages.**

Action on a receipt or note in the words following, viz. July 3, 1790, received of Belding $278 and 30-90ths in continental loan-office certificates, with the interest from the 31st of December A. D. 1787, and $128 in indents, which I promise to return on demand.

The defendant was defaulted, and upon a hearing in damages the court could not distinguish this from the common case of a note given for public securities; this is not a bailment, nor could an action of trover be sustained for the securities, but an action upon the promise contained in the writing.

Judgment for the value at the date of the contract, principal at eleven shillings and six pence, indents and interest at seven shillings on the pound.

STATE v. FARRAND.

A conviction before a justice of a theft, no bar to an information before the Superior Court for a robbery committed at the same time, and for the same theft.

INFORMATION for a robbery committed upon Michael Demorat, in the night of the 2d of February A. D. 1792, by taking from him certain articles of clothing, and some money by force and by putting said Demorat in fear of his life.

The prisoner plead in bar — That he had been prosecuted, convicted and punished, by judgment of Eliphalet Lockwood, a justice of the peace for the same offense, which process and judgment is as follows, viz. Whereas complaint has this day been made to me the subscribing authority, by Michael Demorat, that in the night following the 2d of February he had stolen from him a quantity of money and clothing, by one Peter Farrand and others, transient persons, and prays process; upon which a warrant issued and Farrand was arrested, and arraigned before said justice, was convicted and sentenced to be whipped, which was executed; that he was the same Peter Farrand, and that the stealing therein complained of was the same felonious taking now charged in the information against him for a robbery; and thereupon he says he has been heretofore convicted and punished for the same crime matter and thing. To this plea a demurrer was given by the attorney for the state.

Judgment — That the plea is insufficient; the complaint exhibited to the justice was insufficient and illegal upon the face of it, the justice not having jurisdiction of the cause. Besides if this practice is admitted it would be in the power of the justices to oust this court of its jurisdiction, and screen the most atrocious offenders from merited punishment.

Farrand plead not guilty, and was convicted of a robbery committed by threatening to take away life; and was sentenced to imprisonment in Newgate prison during his natural life.

OSBORN v. LLOYD.

**Securing property by foreign attachment, within the county, gives jurisdiction to the court of a cause, otherwise not within its jurisdiction.**

ACTION of debt by book — both plaintiff and defendant belonged to the state of New York. This action was by foreign attachment, describing the defendant as an absent absconding debtor, and a copy of the writ was left in service with of in the county of Fairfield, agent, factor, trustee and debtor to the defendant.

Plea in abatement — That said debt was contracted in the state of New York and that both plaintiff and defendant were citizens and inhabitants of the state of New York, and that neither of them are or ever were inhabitants of any town in this state. Demurrer.

Judgment — Plea insufficient. The attaching of visible property gives jurisdiction to the court of causes otherwise not within its jurisdiction. By the foreign attachment, the invisible property of the debtor is attached and holden within this county and gives jurisdiction to the court.

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**LITCHFIELD COUNTY, AUGUST TERM, A. D. 1792.**

ROWE v. STODDARD ET AL.

**A grant of the water in a stream, except what shall be wanted for a particular use, the extinguishment of that use, will inure to enlarge the grant.**

ACTION of the case for a nuisance, committed by diverting the water in a certain stream from the plaintiff's slitting-mill. Plea — Not guilty. Issue to the jury.

The case was — Abraham and Daniel Kilborn owners of the stream under whom the defendants claim, in October A. D. 1772 granted seven-eighths of the privilege of the stream to seven persons, to erect a saw-mill and dam upon and to enjoy it so long as they should keep up and maintain the same in good repair, reserving to themselves a sufficiency of water

to carry their fulling-mill, which stood on the same stream four days in a week; provided there should not be a sufficiency of water for both. Afterwards another grant was made, under which the plaintiff claimed, of a right to erect a slitting-mill upon the same stream, the grantee to have the water only in such manner and proportion as to leave enough for the fulling-mill four days in a week, and not to prejudice the saw-mill, in case there should not be a sufficiency of water for all three. The saw-mill was suffered to go to decay and the right of the proprietors was at an end.

The question of law in this case was — Whether the extinguishment of the right of the saw-mill in manner aforesaid, inured to the benefit of the owner of the slitting-mill to enlarge his privilege.

Verdict and judgment for the plaintiff.

By the COURT. The grant to the proprietors of the saw-mill reserved water for the fulling-mill four days in a week, and said saw-mill to continue so long only as it was kept in repair. The grant under which the plaintiff claims, is of the privilege of the water from the slitting-mill, reserving a sufficiency for the fulling-mill four days in the week, and so as not to prejudice the saw-mill. In case there should not be enough for all three, the extinguishment of the right of the saw-mill falls into and enlarges the right of the slitting-mill.

## SWIFT v. BERRY AND THE TOWN OF KENT.

**Towns liable to double damages occasioned by the deficiency of their bridges.**

ACTION upon the statute, entitled an act relating to bridges, declaring that there was an open public highway through the town of Kent, across Ousatonick river, over which there was a bridge, which was the duty of said town to keep and maintain in good repair; that said bridge had for a long time been out of repair and in a defective condition, through the negligence of said town, although they well knew of its deficiency, and that it was their duty to have repaired it; that on the 30th day of November A. D. 1791 said bridge was and for a long time

before had been in a rotten decayed state, so that it was unsafe passing it with horses and teams, which was well known to the inhabitants of said town, and that the plaintiff in attempting to cross it in the evening of said 3d of November with a span of horses worth £30 and a sleigh loaded with wheat, in pursuit of his lawful business, his horses fell through said bridge by reason of its rotten defective condition, and fell upon the rocks, about twenty feet, killed one of his horses and wounded the other so as to render him useless, also broke and destroyed his harness worth £4 lawful money, damage £40 lawful money; of all which the defendants had been duly notified, and that the defendants by force of said statute had become liable to pay him double damages, etc.

The defendants plead — Not guilty. Issue to the jury.

Verdict — That the defendants were guilty and for the plaintiff to recover £25 single damages, etc.

Motion in arrest of judgment — The insufficiency of the declaration; this being an action upon the statute for double damages, it is not alleged that notice in writing, under the hand of two witnesses had ever been given to any of the selectmen of said town of Kent; nor had any presentment ever been made to the County Court of said defective bridge, previous to the injury complained of, without which the plaintiff could not be entitled to double damages.

This motion in arrest was determined by the court to be insufficient, and judgment was for the plaintiff to recover double damages.

The statute is, that the inhabitants of the several towns in this state, shall make, build, keep and maintain in good and sufficient repair, all the needful highways and bridges within their respective townships, unless it belongs to any particular person or persons to maintain such bridge, etc. And if any person shall lose his life through the defect or insufficiency of any bridge or highway, in any township in this state, in

passing over such bridge, etc. after due warning given unto any of the selectmen of the town in which such defective bridge or highway is, or to the person who ought to maintain the same, in writing, under the hands of two witnesses, or a presentment made to the County Court of such defective way or bridge; that then the town or person, whose duty it is to keep in repair such ways or bridges, shall pay a fine of £100 to the parents, husband, wife or children or next of kin to the person killed. The warning or notice in writing aforesaid, respects only the forfeiture of £100 where life is lost.

The next paragraph, on which this action is laid, is, that if any person shall lose a limb, break a bone or receive any other bodily hurt, through or by means of such defect aforesaid, the town or person through whose neglect such hurt is done shall pay to the party so hurt or wounded, double damages; and the like satisfaction shall be made for any team, cart, carriage, horse or other beast of loading, in proportion to the damage sustained — to be recovered by action or information on the statute. This paragraph goes upon the idea that it is the duty of every town to know the condition of their highways and bridges, and to see them kept in good and sufficient repair, and for their negligence in this respect, they are subjected to double damages, and in that case no warning or notice in writing is necessary.

### Dutton v. County of Litchfield.

**The county is liable for an escape through the insufficiency of the gaol unless a clear and adequate remedy against some other person can be shown.**

Application upon the statute to the County Court, complaining that he had an execution against one Holabert for £ upon which said Holabert was committed to prison, and who made his escape through the insufficiency of the gaol, whereby he had wholly lost his debt, etc.

Plea in abatement — It doth not appear by the plaintiff's showing in his declaration but that said Holabert is worth the debt, and that the money may be collected from his estate;

and unless this appears the county are not chargeable by the statute. Demurrer.

Judgment — Plea insufficient.

The statute is, that if any person lawfully committed to any of the gaols in this state, shall break such gaol and make his escape through the defects or insufficiency of such gaol, the cost and charges occasioned and the damages sustained thereby shall be paid out of the county treasury of that county, etc. provided nevertheless, that nothing in this act shall be construed to prejudice or hinder any party or person from recovering any cost, expense or damages of the person or persons, or from their estates who shall break or be aiding or assisting in breaking the gaol; or who shall escape or be aiding thereto, according to law: And when such remedy for satisfaction may be had, the county shall not be charged with, nor be ordered to pay said expense cost, and damage; provided also, that nothing in this act shall be extended to excuse any sheriff in any escape, except what happens through the insufficiency of the gaol aforesaid, and that without his default or negligence; nor shall this act hinder any person from any remedy he now hath, or hereafter by law may have, in all or any of the matters aforesaid.

The law injoins it upon every county to keep and maintain in good and sufficient repair, a common gaol in every county town in the several counties, at the charge and expense of the respective counties; and makes them responsible for the damages and cost any person shall suffer through their negligence, in this respect. Whenever therefore there is an escape through the insufficiency of the gaol, the county is liable, unless the county can point out and show a clear and certain remedy against some other person or persons, of whom satisfaction for said cost and damages may be recovered, and so come within the proviso of the statute.

ROWE V. COUCH.

**A creditor taking a mortgaged estate in satisfaction of a debt due from the mortgagee, does not alter the right or duty of the mortgagor.**

ACTION of the case, declaring that on the 5th of December A. D. 1786 he was indebted to Charles M'Evers and James Seagrove £162 10s. 8d. York money, for which he gave his bond and also a mortgage of his farm in New Milford; that on the 4th of October last, Jared Lane, attorney to said M'Evers and Seagrove, held his bond on which was due £3 6s. 9d. for interest, and the defendant as substitute to said Lane, called upon the plaintiff for payment, or some further security for said interest money; and the plaintiff to secure said interest deposited in the hands of the defendant, a note the plaintiff held upon Eastman, for £25 lawful money, payable in cattle, horses, etc. which the defendant received and engaged to return to the plaintiff upon said sum of £3 6s. 9d. interest being paid, for which note the defendant gave his receipt in writing under his hand, etc.

That Jabez Bacon of Woodbury, recovered a judgment against M'Evers and Seagrove for £155 5s. lawful money, for which he had execution and levied it upon the plaintiff's farm, mortgaged to said M'Evers and Seagrove aforesaid, and had it appraised off in satisfaction of said execution on the 19th of October last past, at which time there was due on said bond and mortgage to said M'Evers, etc. the sum of £149 9s. 9d. lawful money only, for principal and interest; that the whole of the debt due from the plaintiff to said M'Evers, etc. both principal and interest was paid, and that the plaintiff had right to receive back said £25 note upon said Eastman, which was pledged with the defendant for security of said interest agreeable to the tenor of said receipt — of all which the defendant had notice, and said note demanded, particularly on the 29th of November inst. and thereupon the defendant became liable to pay the plaintiff the amount of said Eastman's note, and in consideration thereof assumed and promised, etc. damage £30 — writ dated 30th November 1790.

The defendant prayed oyer of said receipt and recites it, being as follows, Received of Thomas Rowe a note upon Eastman for £25 lawful money, payable in cattle, horses, etc. which note is put into my hands for security of £3 6s. 9d., due for interest on a bond, given by said Rowe to Charles M'Evers, which note I am to deliver up to said Rowe upon said interests being paid; and thereupon says that the plaintiff's declaration and matters therein contained are insufficient in the law.

Judgment — That the declaration is insufficient. The receipt produced on oyer is a different receipt from that declared upon as the ground of the plaintiff's action. A debt to Charles M'Evers is essentially different from a debt to the company of M'Evers and Seagrove. Besides, the plaintiff hath not paid his debt. Bacon's taking the plaintiff's farm by execution may entitle him to receive the money from the plaintiff, but hath not altered the nature of the mortgaged premises, nor in any manner paid or satisfied the plaintiff's debt.

LANGDON v. LANGDON.

**If an execution is indorsed by mistake or accident — the party's remedy is by motion or *scire facias* to the same court for an *alias* — and the court in such case do not render any new judgment.**

ERROR to reverse a judgment of the County Court, on a *scire facias*, brought by said Ezekiel against said James, complaining that he had an execution against said James for £15 lawful money debt and £2 11s. 8d. cost, issued on a judgment of the County Court; that he delivered it to Reed, a constable, who levied said execution on certain articles of household furniture, necessary for upholding life, and which by law were exempted from being taken in execution — which articles said constable posted and sold at public auction and indorsed them on said execution; that said James instituted his action against said constable for said articles of goods taken as aforesaid, and had recovered judgment for £12 10s. lawful money damages and cost against said constable, for said goods, on the ground that they were not liable to be taken in execution for debt: whereby his said judgment and execu-

tion against said James remained unsatisfied, although indorsed in full; praying for an *alias* execution to be granted on said judgment for the sum due thereon, etc.

To this writ of *scire facias* a demurrer was given, and the County Court gave judgment that the declaration was sufficient and for the plaintiff to recover the sum of £7 13s. 7d. lawful money damages and £5 2s. 6d. cost.

Errors assigned — 1st. That the declaration was insufficient, for it appeared to be the plaintiff's own fault, that said necessaries were taken. 2d. Said Ezekiel's remedy was against said constable who indorsed said execution — as it did not appear that he gave said constable orders to take them. 3d. That said Ezekiel's remedy was by motion to the court for an *alias* execution. 4th. No cost ought to have been allowed. Plea — Nothing erroneous.

Judgment — Manifest error.

By the Court. Where an execution is discharged or indorsed by mistake or accident, the party's remedy is by application to the same court, by *scire facias* or by motion, as the case may be, for an *alias* execution; and the court if upon examination they find it to be right and just, will grant an *alias* execution, but no new judgment is entered for damages or cost.

TALMADGE v. NORTHROP.

A witness interested in the question not admitted.

A good cause of arrest that one of the jurors is interested in the same question.

Action of the case; declaring, that on the 23d of June, A. D. 1789, the plaintiff sold to Luman Bishop, a number of shipping horses to the value of £82 5s. lawful money, that said Luman being a stranger to the plaintiff, and having the appearance of a man of property, upon his application and request the plaintiff took said Luman's note for £51 5s. of said purchase money payable the 5th of August then next; that said Bishop was then and ever since had been a bankrupt, of whom said debt was not recoverable; that the defendant was before, and at the time of selling said horses to said Bishop,

and his giving his note aforesaid, secretly in partnership with said Luman when he purchased said horses of the plaintiff, and that said Luman gave his note aforesaid for the use of the defendant, and that the defendant had taken the benefit of said horses and shipped them to the West Indies and received the avails; whereby an action had accrued to the plaintiff to recover of the defendant said sum of £51 5s. lawful money and interest, etc. Plea — Not guilty. Issue to the jury.

The plaintiff offered one Bird as a witness, to whom it was objected that he was interested in the point in question; for that he had a claim against the defendant for horses sold to said Bishop on credit about the same time, which went in the same drove and were shipped in the same vessel, and his recovering depended upon the same secret partnership claimed by the plaintiff.

By the COURT. He cannot be a witness. The jury found a verdict for the plaintiff, and £60 8s. 5d. damages.

The defendant moved in arrest of judgment — That Jonathan Wright one of the jurors who tried said cause had a similar demand upon the defendant with the plaintiff, for two horses sold on said Bishop about the same time, on credit, which went in the same drove, and were shipped in the same vessel, and was waiting to see the event of this suit, of which the defendant was wholly ignorant, when said jury were impaneled. Demurrer.

Judgment — Motion in arrest sufficient, and a repleader ordered.

## PECK v. BALDWIN.

**If a grantee agrees to give a defeasance and after he has got the deed, evades doing it, chancery will relieve against the fraud and enforce the agreement.**

PETITION in chancery; showing, that the petitioner was imprisoned for a debt due to of £40 lawful money, and had not the means of paying it; that the petitionee, Mr. King and a number of his neighbors agreed they would be his bondsmen, and take him out of prison, if he would convey

to them by an absolute deed a certain tract of land he owned in Harwinton, with a quarry of free stone upon it, to be released back to him, upon his paying said debt, and saving them harmless; which agreement was accordingly carried into execution; that afterwards all the grantees in said deed, quit-claimed and released their right to the petitionee, upon his undertaking to pay said debt and indemnify them; at which time said Baldwin agreed and promised to execute to the petitioner a bond, conditioned to release back said land and stone quarry, to the petitioner upon his paying said debt and indemnifying him; that said Baldwin had ever found means to avoid giving said bond; that he had sold a part of said farm to John Collins, for £140 lawful money, which was a much greater sum than was due to said Baldwin; that said Baldwin retained the rest of said farm and said valuable stone quarry; praying that an account be settled between him and the petitionee; and that the petitionee be compelled to pay him the balance, after deducting what was justly due to the petitionee; also to release to him the remainder of said land, not sold to said Collins with said stone quarry.

The court heard the petition, and finding the facts alleged to be true, granted it upon the ground of fraud, that said Baldwin might not take advantage of his own wrong, in evading to give said bond of defeasance, which he had agreed to give.

The court settled the account between the parties and ordered said Baldwin to pay the balance, also to release and reconvey the lands not disposed of with the stone quarry, to the petitioner.

HOLBROOK v. JUDD.

**A declaration that is substantially good is not vitiated by matters of surplusage.**

ACTION of the case; declaring, that on the 5th of March, A. D. 1790, he took out two writs of attachment against the defendant, one on a note for £60, and one on book for £100, both returnable to the County Court on the fourth Tuesday of said March; which were served by attaching the defendant's body; that the said Judd then having in his hands a note

upon the plaintiff in favor of Joseph Hallet, for £118 11s. York money, as attorney to said Hallet, applied to the plaintiff and informed him that unless he would take up said attachments against him and not have them returned to court, he would immediately attach him upon said Hallet's note; but if the plaintiff would take them up and not return them to court, said Hallet's note should not be prosecuted or put in suit until the next winter after; to which proposal the plaintiff agreed and took up said attachments, and caused them not to be returned to court; in consideration whereof the defendant promised and agreed that said Hallet's note should not be put in suit until the next winter after: Yet the plaintiff says that the defendant not regarding his agreement, prayed out a writ of attachment on said Hallet's note, dated the 1st day of July, A. D. 1790, and caused his lands to be attached in the state of New Hampshire, and in November A. D. 1790, recovered judgment against the plaintiff for £176 York money, for which he took execution, and had it satisfied by the plaintiff's lands; and the defendant also purchased a note of Ephraim Wheeler, against the plaintiff, for £30 14s., on which note he caused the plaintiff's body to be attached, in said New Hampshire on said 1st of July, and to be imprisoned, until he turned out all his movable estate to pay the defendant's said debt at his own price. Plaintiff's damage the sum of £200. The defendant demurred to this declaration.

The exceptions taken were — 1st. Uncertainty whether the promise was, never to sue said Hallet's note, or not to sue until next winter. 2d. A promise never to sue would be unreasonable. 3d. The consideration idle and insignificant, being only to stop said attachments which might be renewed the next moment. 4th. That the declaration contained a charge for attaching him upon the Wheeler note, which was not within the agreement.

Judgment — That the declaration is sufficient, it contains substantially a good consideration; that is, forbearance and stopping said suits by attachment: a clear and certain promise,

viz. that said Hallet's note should not be put in suit until the then next winter; and a breach by putting it in suit on the 1st of July after; all the rest being surplusage might better have been omitted, and may well be rejected.

### Cogswell v. Wheaton.

**An action not appealable, was erased from the docket, after the jury were impaneled.**

Action of trespass brought before a justice. The defendant set up title; and the cause was removed to the County Court agreeable to the statute.

In the County Court the defendant changing plead not guilty; and the cause was tried on that issue, and appealed to this court, and closed to the jury; this being discovered by the court upon reading the files, after the jury were impaneled, the cause was ordered to be erased from the docket, as not being properly before this court. See the case of Durkee v. Varnum, Windham, March Term, A. D. 1792, and the case of Sweet v. Dow, New London, March Term, A. D. 1792.

### Hannah v. Wadsworth.

**A collector, in the sale of lands for payment of continental taxes, hath not right to take advantage of the difference between hard money and state bills.**

**The consideration expressed in a deed is not conclusive upon the grantor as to the amount or the payment of the purchase money.**

Action of the case; declaring, that the defendant was collector of state taxes, etc. and had a number of taxes against the plaintiff; that the defendant advertised and sold his lands to a greater amount than was due for taxes, and the cost.

To which a special plea was made in bar, and demurred to by the plaintiff, which was heard and adjudged to be insufficient last court; and now the parties were heard in damages.

It appeared that there were certain taxes laid for continental bills, and made payable in state bills or coin, at a discount of one for forty; that the collector sold the lands for coin only, when the difference between state bills and coin was two for one, which made the difference of £11 10s.

The court judged that the defendant ought not to avail himself of this advantage, and gave judgment for the plaintiff to recover that sum in damages. It was adjudged in this case that the consideration expressed in the deed, was not absolutely conclusive upon the grantor, as to the amount or payment of the purchase money.

SEYMOUR v. MERRILLS.

**In actions of defamation, evidence of the plaintiff's general character admissible.**

ACTION of defamation. Issue to the jury. In this case it was determined, that evidence of the general character of the plaintiff respecting the crimes charged, may be given in evidence by the defendant; but no evidence of particular facts, except those charged by the words. See Brunson v. Lynde, New Haven, January Term, A. D. 1792.

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**HARTFORD COUNTY, SEPTEMBER TERM, A. D. 1792.**

BEACHER v. BRAY.

**Collectors have no authority to sell lands for payment of taxes, at any other time or place than that set in the advertisement, and cannot adjourn the vendue by letter.**

ACTION of trover for a pair of oxen, a cow, etc. which the defendant had taken as collector, and sold for taxes, damage £25. Plea — Not guilty. Issue to the jury.

The plaintiff claimed these cattle upon the ground, that when the defendant took and sold them, there was nothing due for taxes, but that they had all been paid by a piece of land which the defendant had levied upon, and advertised to be sold as the law directs; but on the day of sale the defendant was so unwell that he could not attend the vendue, he wrote a letter and thereby adjourned the vendue to a future day, and then attended and sold said land to one Pardey.

The question of law upon which this case turned was — Whether this was a valid sale, and whether the collector had right thus to adjourn the vendue.

The jury found a verdict for the plaintiff, from which the court dissented, and gave their opinion upon the question of law. The authority of the collector is by statute, and that authority must be pursued.

The statute is — That the collector shall distrain goods and chattels if to be had, but if no goods or chattels can be found, or shall be tendered, he shall attach the real estate of such person, if to be found within his precincts, etc.

That when real estate shall be taken as aforesaid, the officer taking the same shall proceed to sell and dispose thereof at public auction, sufficient for payment of such taxes charged against the owner, and to satisfy the legal cost and fees. Provided nevertheless, that the time and place of sale for payment of such taxes shall be advertised by the collector, three weeks in some public newspaper in this state, at least six weeks before such sale.

Here it is expressly required that the time and place of sale should be advertised three weeks in some public newspaper in this state, at least, six weeks before such sale; and the collector cannot by letter or otherwise alter the time and place thus advertised and fixed; nor will the law validate a sale made at any other time or place. This may appear to be an inconvenience, but the law has made no provision to remedy it. Had the collector attended and opened the vendue, and no bidders appeared, he might doubtless have adjourned, but that was not the case.

Dyer and Wolcott, JJ., were of a different opinion. The jury adhered to their verdict.

Sebor and Shaler v. Levi Robbins and Israel Porter.

A purchaser of the mortgagor without notice, of the mortgage of a part of the mortgaged premises, is quieted, by the mortgagor's satisfying the mortgage money out of the residue of the premises.

Petition in chancery, showing that Levi Robbins by deed dated November 1786, mortgaged a piece of land to Oliver

Robbins, to secure a debt of £60; that afterwards said Levi sold and conveyed to Israel Porter, one acre and twenty-six rods of said mortgaged premises by an absolute deed, who immediately went into possession; that in April A. D. 1788 the petitioners recovered a judgment against said Levi and one Stanley, both bankrupts, for the sum of £268 took out execution and levied it on that part of said mortgaged premises which was not conveyed to said Israel, and was appraised at £280 including the incumbrance of £67 due to Oliver Robbins, which left due on their said execution £55; that since said levy they have paid said Oliver and taken a conveyance of all his interest in said mortgaged premises, and pray that the petitionees be compelled to pay them their debt and what they have paid out, or be foreclosed of their equity of redemption.

It appeared that said Porter was a *bona fide* purchaser for a valuable consideration, without notice of said mortgage to said Oliver; that the petitioners knew of said deed to said Porter, when they levied said execution, being bounded expressly upon the land.

Judgment — That the petitioners take nothing by their petition.

The petitioners by the levy of their execution acquired all the right and interest Levi had in that part of the mortgaged premises, levied upon, which amounted to £213 more than to pay said Oliver his debt, the incumbrance upon the whole mortgaged premises; and upon their paying Oliver the whole of his debt, out of the interest they had of Levi, it extinguished his right to the whole premises in equity — his release therefore, conveyed nothing but a naked legal title, and as the mortgage money was paid out of Levi's estate, it ought to inure equally for the benefit of Porter as the petitioners — they having a further debt against Levi, made no difference in this respect and can be no ground for a degree of foreclosure against said Porter or his assigns.

M'LEAN AND WIFE v. EBENEZER BARNARD, EXECUTOR OF DANIEL GOODWIN.

The judge of probate a good witness to a will.

APPEAL from a judgment of the Court of Probate in proving and approving the last will and testament of said Daniel Goodwin, for the following reasons —

1st. That the testator at the time of making and executing said last will and testament was not of sound disposing mind and memory.

2d. That the testator, at the same time he made and executed his will, first made and executed a deed of a part of his lands to Jonathan Avery; who is one of the three subscribing witnesses to said will, which land said Avery now holds and claims by force of said deed — whereby said Avery became interested in the sanity of the testator, which is the point in question, and so said Avery was not nor is a competent witness to said will.

3d. That Jonathan Bull, Esq. one of the three subscribing witnesses to said will was at the time of subscribing his name as aforesaid and still is the judge of probate for the district in which said testator lived, and to whom belonged the probate of said will, and so said Bull was not nor is a competent witness to said will.

The appellee denied the truth of the first and second exceptions, and demurred to the third.

Upon a full hearing of the evidence and the counsel, the court found that as to the first reason, said Daniel the testator, at the time of making and executing said will was of sound disposing mind and memory. As to the second reason, the court found that said testator did not at the same time he made and executed his will, first make and execute a deed to said Jonathan Avery, of a part of his lands, etc. as the appellants in their reason have alleged. And as to the third reason, the court were of opinion that it was insufficient, and thereupon affirmed the judgment of the Court of Probate.

## Remington v. Remington.

**A lease to a man during his life and the life of his wife, if he should marry, vests no interest in the wife.**

Action of ejectment to recover possession of a certain farm described in the declaration, declaring that on the 26th of March A. D. 1771, Thomas Remington being well seized of said premises, leased the same to Daniel Remington, in the words and manner following, viz. Thomas Remington, for the consideration that my father Daniel Remington hath this day made and executed to me a deed of his farm on which he now lives, for his support and maintenance during his natural life, and the life of his wife (in case he should marry.) I do hereby remise, lease and to farm let unto him the said Daniel, the farm on which he now lives, bounding, etc. to use, occupy and improve, according to the rules of good husbandry, for and during the term of his natural life and the life of his wife, if he should marry, etc. Said Daniel entered and possessed by force of said lease, and on the 11th of August A. D. 1774 married the plaintiff, and on the 12th of May A. D. 1790 said Daniel died, and thereupon the plaintiff became seized by force of said lease of said premises, for the term of her natural life, and that the defendant afterwards, viz. on the 12th of August A. D. 1790 entered and disseized her, etc.

Plea in bar — That after said marriage took place the plaintiff eloped from the said Daniel, and by the aid of an arbitration they agreed upon the terms of living separate; that at and for thirteen years before said Daniel's death, she lived separate from him, in which time he disposed of all his right in said letten premises to the defendant, and that the defendant had purchased of the heirs of said Thomas, who were also deceased, all their reversionary right to said premises. To this plea a demurrer was given.

Judgment — That the plea in bar is sufficient.

The question of law which arises in this case, is, upon the construction of the words in the lease from Thomas to Daniel, viz. I do remise, lease, etc. unto said Daniel, for and during

the term of his natural life, and the life of his wife, if he should marry.

Here is no interest granted to the wife, and if the words which are inserted in the lease, and the life of his wife if he should marry, have any operation, it would be to lengthen the term beyond his own life, in case his wife survived him; and the interest would vest in his heirs, during her life, so that she can have no right, except it be of dower by force of the statute.

OTHNIEL WILLIAMS, ADMINISTRATOR OF OTHNIEL WILLIAMS, DECEASED, v. REBECCA BELDEN, ADMINISTRATRIX ON THE ESTATE OF JOHN BELDEN, DECEASED.

**Creditors or their representatives, being out of the state, at the time of publishing an order of probate limiting the time for creditors to exhibit their claims against a deceased person's estate, have two years to exhibit their claims in.**

ACTION on note; declaring, that John Belden deceased, in and by a certain note, dated the 19th of April A. D. 1782, promised the said Othniel deceased, to pay to him the sum of £14 7s. 1d. upon demand, with the lawful interest, which neither the said John nor the defendant have ever performed, etc.

Plea in bar — That on the 9th of November 1790, the Court of Probate made an order that six months be allowed to the creditors of said John to bring in their claims against said estate from the time of publishing said order in the newspaper; and that said order was duly published on the 15th of November aforesaid, and that said claim was not exhibited to the defendant until long after the expiration of said six months from the publication of said order, and by the statute entitled, etc. the plaintiff was barred of any recovery on said note.

The plaintiff admitting said order and the publication thereof replied — That he ought not to be barred; for that Hannah Williams was appointed sole executrix of the last will and testament of said Othniel deceased; that when said order was made and published she was sick and incapable of exhibiting said note or of procuring any person to do it for her, and so continued until her death, which happened in about

one month after publishing said order; that the defendant well knew of said note as a subsisting debt against said John's estate, within said term of six months; that the plaintiff at the time of making and publishing said order was out of this state over sea, residing and dwelling in the island of Guadaloupe, where he continued to reside until after the expiration of said six months; that in the summer of A. D. 1791 he returned from over sea into this state, and being next of kin to said Othniel deceased, did soon after his return aforesaid, viz. on the 10th of September 1791 take letters of administration upon the estate of said Othniel with the will annexed, and within six months after his return into this state, he exhibited said note to the defendant, said John having left a plentiful estate to pay this and all his other debts, and no distribution had then been made among his heirs.

The defendant rejoined, traversing her having knowledge of said note as a subsisting debt within said six months. The plaintiff demurred.

By the COURT. The rejoinder of the defendant is insufficient.

The statute provides that any persons not being inhabitants in this state, shall have liberty to exhibit their claims against any estate that shall not be represented insolvent, at any time within two years after publication of notice to the creditors, and shall be entitled to payment out of the clear estate that shall remain after payment of those claims that were exhibited within the time limited, and the plaintiff is within the reason of the proviso in the statute.

This judgment was affirmed upon a writ of error in the Supreme Court of Errors.

**WINDHAM COUNTY, SEPTEMBER TERM, A. D. 1792.**

BACON V. CHILDS ET AL., SELECTMEN OF THE TOWN OF WOODSTOCK.

**A decree in chancery must find the facts directly and positively.**

ERROR to reverse a judgment of the County Court, on a petition of said selectmen against said Bacon; showing that his mother, Sarah Bacon, had become poor and impotent; that they had expended £15 in her support, and that she was likely to be further chargeable to said town; and that said Ephraim Bacon was of ability to pay said £15 and to provide for the future support of his said mother — praying that he might be compelled to pay said £15 and provide for her future support.

Upon which petition the County Court passed the following judgment.— This court having heard the evidence, etc. and considered thereof do find the facts in said petition so well proved, that it is decreed and ordered that said Ephraim pay said £15 and provide for the support of his said mother.

Error assigned — That the court had not found the issue nor any facts whatever, whereon to found a decree or judgment.

Judgment — Manifest error for the reason assigned in error.

HUMES V. DAY.

**A witness discharged of his interest ought to be admitted. The issue put must be answered directly.**

ERROR to reverse a judgment of a justice in an action brought by said Day against Humes, upon a note of hand, dated the 17th of February A. D. 1789, for £1 2s., payable on demand with interest.

Plea — Full payment before the date and service of the plaintiff's writ, on which the parties were at issue.

To prove said payment the defendant offered one Israel Bates as a witness. The plaintiff objected, that said Bates sometime before had promised and engaged to indemnify the defendant against said note and all cost and damage he might

sustain thereon. Upon which two discharges were produced from said Humes to said Bates, dated subsequent to said undertaking, discharging said witness from all demands generally and particularly from his agreement to indemnify him on account of said note; yet said justice refused to admit said Bates as a witness — upon which the defendant filed his bill of exceptions, stating the above facts which were allowed by the justice. And said justice proceeded and gave judgment — That he was of opinion that the matter alleged in the defendant's plea in bar, is not sufficiently proved and that the plaintiff recover, etc.

Errors assigned — 1st. That said justice ought to have admitted said Bates a witness. 2d. That said justice had not found the issue one way or the other.

Judgment — Manifest error for both causes assigned in error.

FITCH v. BROOMFIELD.

**Chancery will not interpose where the party has adequate remedy at law.**

PETITION in chancery, showing that in November 1773, he was indebted to said Broomfield by note £100 which was upon interest; that on the 24th of July A. D. 1777 he paid to Joseph Trumbull, Esq. who was then attorney to said Henry Broomfield and who had said note to collect £120, and took his receipt therefor, as follows; Received July 24th 1777 of Eleazer Fitch £120 lawful money, which I promise to pay to Henry Broomfield on account of said Fitch's note to him for £100 given in A. D. 1773. Joseph Trumbull. That in A. D. 1789 the petitioner removed to St. Johns in Canada, said Trumbull being dead and insolvent; that said Broomfield brought forward an action upon said note against the petitioner, by attaching his property, and in August A. D. 1791 recovered judgment by default, for the whole sum of said note, and has had the same paid and satisfied by the petitioner's lands — praying that said Broomfield be decreed to repay said £120 and interest, or to return so much of said land appraised off in payment of said debt.

Plea in abatement — That the petitioner's remedy was at law.

Judgment — Plea sufficient. If the receipt is to be considered as Broomfield's, it will apply at law and whether it is so to be considered or not, is determinable at law, if it is not to be considered as Broomfield's receipt at law, then it cannot be applied to said note in chancery any more than at law.

GREENLEAF v. SABIN, ADMINISTRATOR OF WELLES.

**Expenses incurred subsequent to the decease of the person not subject to the consideration of commissioners.**

APPEAL from the judgment of the Court of Probate in accepting the report of commissioners on the insolvent estate of said Welles.

Reasons for the appeal — That said report contained a sum of about £300 exhibited by said administrators and allowed by said commissioners, for providing and supporting the children of said Welles since his decease.

Plea in abatement of the appeal — That the allowance of commissioners in such cases is final, from which no appeal lies.

Judgment — Plea in abatement insufficient, and the judgment of the Court of Probate disaffirmed. See Staniford v. Hide, adjudged at Tolland February Term 1792. The commissioners have to do only with the debts due from the deceased; charges which have been incurred subsequent to the death of the intestate are to be exhibited and allowed by the judge of probate.

CRANE v. HANKS.

**A court of chancery will open the foreclosure, where it appears the mortgagor meant to perform, and by mistake or accident was prevented.**

PETITION in chancery, showing that the Superior Court in March A. D. 1791, passed a decree that upon the petitioner's paying said Hanks £268 3s. 6d. lawful money, by the 1st of March A. D. 1792, said Hanks should reconvey to the petitioner, certain mortgaged premises, under a penalty; that on the 4th of May A. D. 1791, he procured the money and

offered and tendered it to said Hanks, as he verily supposed, and said Hanks agreed to accept it and to meet him in the afternoon of said day at the house of Constant Southworth, Esq. and give a deed and take the money; that said Hanks did not meet him at said Southworth's that afternoon, although the petitioner waited there the whole of said afternoon, but had ever since artfully avoided the petitioner and evaded receiving said money or giving said deed; and the petitioner relying on said tender to be good and valid brought his *scire facias* against said Hanks, to recover said penalty; but by reason of some legal defect in the manner of making said tender, the court could not enforce the penalty — praying that said decree of foreclosure might be opened and he have a further time to pay said money and redeem said estate.

Plea in abatement — That the petition did not contain sufficient reasons for opening said decree of foreclosure.

Judgment — That the plea in abatement is insufficient; and in March A. D. 1793, the court heard the petition on the merits and opened the foreclosure, and gave a further day to pay the money and redeem. See Doty v. Whittlesey, Litchfield, August Term, 1791.

## Ainsworth v. Peabody.

**The bail is exonerated by a judgment in favor of his principal, although upon a new trial judgment is against him.**

Scire Facias on a bond given for the appeal of a cause. The appellant recovered in said cause — afterwards a new trial was granted, and final judgment was rendered in favor of the appellee — who now brought this *scire facias* against the bail.

The question of law was — Whether the bondsman was not exonerated by the first judgment in favor of the appellant. Had the judgment been set aside by a writ of error the bail would not be subjected. This was decided in the case of Butler v. Bissel at New London, September Term, 1785 — on a *scire facias* against the special bail. And the courts have considered a judgment set aside by granting of a new

trial, as having the same effect in respect to the bail as a judgment reversed upon a writ of error. See Fleming, Executor of M'Donald, v. Sheriff Lord, Litchfield, August Term, 1790.

The plaintiff finding the opinion of the court against him, withdrew the action.

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**NEW LONDON COUNTY, SEPTEMBER TERM, A. D. 1792.**

ROGERS v. HENRY.

*Assumpsit* will not lie for a sum a person is doomed to pay.

ERROR to reverse a judgment of a justice in an action brought by Henry v. Rogers; declaring, that he was head of a class for raising recruits in A. D. 1781, to which the defendant belonged; that the defendant was assessed twenty-two shillings eight pence by said class as his proportion to pay; that the defendant never paid said sum, and the plaintiff paid it for him; that in April 1792, upon application of the plaintiff to the selectmen, pursuant to the existing law in A. D. 1781, they doomed the defendant to pay forty shillings for his neglect; which the defendant thereupon became liable to pay, and in consideration thereof assumed and promised to pay said forty shillings, etc.

Plea in bar — That by the law then existing, the sum which the defendant was doomed to pay, was to be collected by warrant, and not otherwise. Demurrer.

Judgment of the justice — That the plea was insufficient, and for the plaintiff to recover.

Common errors assigned.

Judgment — Manifest error; for that *assumpsit* doth not lie for the sum the defendant was doomed to pay, any more than for a sum judgment was rendered for, the law provides a remedy in one case as well as the other.

ALLEN v. ROGERS.

**The pending of an action on book, no bar to the defendant's suing the plaintiff on book.**

ERROR to reverse a judgment of a justice in an action of book-debt Rogers v. Allen.

To which the defendant plead in bar — That having prayed oyer of the plaintiff's book; all the articles charged therein were delivered more than six years before the date and impetration of the plaintiff's writ, and by the statute in addition to an act concerning book-debts the plaintiff was barred of any recovery.

The plaintiff replied — That the said Allen brought his action against him on book, per writ dated the 30th of April, A. D. 1792, to be answered on the 7th of May then next, to which said Rogers plead that he owed the said Allen nothing by book, but that the plaintiff was in arrear in debt to the defendant; which cause was adjourned to the 19th of said May, when on trial the plaintiff found that he owed the defendant, and withdrew said action; by which means the plaintiff was prevented suing for his debt. Demurrer.

Judgment — That the reply of the plaintiff is sufficient, and that he recover.

Error assigned — That said reply ought to have been adjudged insufficient.

Judgment — Manifest error; for said Allen's action was no bar to Rogers's suing for his debt; and the statute is peremptory unless the debt is sued for within the time limited, and said Allen's action did not put said Rogers's book in suit, although he might have recovered in that action the balance which was due to him.

RANDAL v. WOODBRIDGE ET UX. AND RODMAN ET UX.

**Persons who have lately resided in this state are to be served with a copy of the process left at their last usual place of abode.**

ACTION of partition; in which the defendants were described as belonging out of this state; service returned, was

by leaving copies with Roger Griswold, Esq. attorney to said Woodbridge and wife and to said Rodman and wife.

Plea in abatement — That within three years last passed, the defendants were all inhabitants of this state, and no copies had been left in service at their or either of their last usual places of abode. 2d. That said Griswold is not, nor was attorney to said Rodman and wife, at the time said copy was left with him in service; without that, that he was and is attorney to said Rodman and wife. Demurrer to the plea.

Judgment — Plea sufficient; for that said Rodman and wife have had neither legal nor actual notice of this suit.

### Mott v. Goddard.

**In an action for entering the house and debauching the plaintiff's daughter, the daughter admitted as a witness.**

Action for breaking and entering his house, and begetting his daughter with child. Plea — Not guilty. Issue to the jury.

The daughter was offered as a witness, and objected to; that she had a suit depending for the maintenance of said child; also an action for a breach of promise to marry her.

By the Court. She is admissible from the necessity of the case, and upon the ground of former precedents from books, and in this state. The court also admitted evidence to prove her being familiar with other men about the same time, to lessen the damages. This action was withdrawn.

### Rogers et al., Two of the Executors of James Rogers, v. Moor, a Coexecutor.

**A court of chancery will not interpose between co-executors, unless it appears to be absolutely necessary for the purposes of justice. A petition may be amended upon payment of cost.**

Petition in chancery; showing, that said James Rogers, on the 25th of February A. D. 1790, let his farm, stock and farming utensils to said Moor for the term of one year; that he made his will and appointed the petitioners and the petitionee his executors, and soon after died, and before said term was

expired; that he owed large debts, more than his personal estate would pay, without the stock let to said Moor, for which debts the petitioners were liable, and said Moor, notwithstanding his term had expired, refused to deliver up said stock and farming utensils, which belonged to said James's estate, or to account for them; praying that he might be compelled to deliver them up to the petitioners.

Plea in abatement — That said petition was complicated and joined matters which could not be joined. 2d. That it was insufficient.

Judgment — Plea in abatement sufficient; for there is no averment that the petitioners have paid the debts, or have any judgment against them; or but that the respondent is as liable, and as able to pay the debts as they are.

The petitioners moved to amend the petition and supply the necessary averments, which was allowed on payment of cost.

BOARDMAN & BREWSTER v. STEWART.

A creditor to an absconding debtor may not join several agents, factors and debtors in one *scire facias*.

A judgment must be on plea, default or *nihil dicit*.

ERROR to reverse a judgment of the County Court on a *scire facias*, brought by said Stewart v. David Boardman and Jonathan Brewster; declaring, that he brought an action against Jonathan Boardman, an absent absconding debtor, and left copies with said David and said Brewster, agents, factors, attorneys, and debtors to said Jonathan Boardman; that he recovered judgment against said Jonathan Boardman, took out execution which had been returned *non est inventus;* and that said David and said Brewster, were agents, factors, etc. and had the effects of said Jonathan in their hands, when said copies were left as aforesaid; praying for remedy against them, etc.

Said David plead — That he never was agent, factor, attorney, or debtor to said Jonathan Boardman, nor had any

of his effects in his hands; on which plea the plaintiff joined issue, and the court found that he was agent, factor, attorney and debtor to said Jonathan Boardman, and gave judgment for the plaintiff to recover; and judgment was entered against said Brewster without any plea or default, and not upon *nihil dicit.*

Common errors assigned.

Judgment — Manifest error. Two men or more may be agents, factors, attorneys, and debtors to another, jointly or separately; if separately, they may all be copied, but not joined in one *scire facias.*

In this case it doth not appear that they were joint agents, attorneys, or debtors; the judgment may therefore operate very injuriously, unless the court make up several judgments upon one *scire facias.* Further it doth not appear that judgment was rendered against said Brewster, in any legal way or manner.

## Wight v. Geer.

**A note executed on Sabbath day is void.**

Error to reverse a judgment of the County Court, in an action upon a note for £15 payable on demand with interest, dated the 15th day of June, A. D. 1788.

Plea in bar — That said note was made and executed and delivered on the 15th day of June, A. D. 1788, at noon, which was Sabbath or Lord's day, and void.

Plaintiff replied — That the defendant was a justice of the peace, and ought not to take advantage of his own wrong, and that he ought not to be barred, without that, that said note was executed and delivered on the Sabbath or Lord's day, at noon. Issue to the jury; who found that said note was executed, etc. on Sabbath or Lord's day at noon, and that the defendant recover his cost.

Motion in arrest — That the issue was immaterial.

The court determined the motion to be insufficient, and gave judgment for the defendant to recover his cost.

Error assigned — That said motion ought to have been adjudged sufficient.

Judgment of the County Court affirmed. It being against the law, to execute notes on the Lord's day.

LORD V. STRONG ET UX.

**One copy left in service at the house, good service for both a man and his wife on a petition.**

PETITION in chancery. Plea in abatement — That said petition had been no otherwise served on the said Strong and wife, than by leaving one copy of said petition in service at their usual place of abode, whereas two copies ought to have been left in service. Demurrer to the plea.

Judgment — Plea in abatement insufficient.

AYERS V. TILLOTSON, AND THE SOCIETY OF CHESTERFIELD.

**Unless there is a certificate that the duty is paid on the appeal of an action, the appeal will not lie.**

ERROR to reverse a judgment of the County Court in an action on book, brought by said Ayers v. Tillotson et al. before a justice of the peace, demanding £4.

The defendants plead — That having prayed oyer of the plaintiff's book, it consisted of the following charges, viz. The Society of Chesterfield, Dr. to keeping school two months at forty-five shillings per month, £4 10s.; and that a part of said Chesterfield society described by certain lines and bounds, was by act of assembly, in A. D. 1769, incorporated into a school district by themselves, and had no right to vote with said Chesterfield society, respecting matters which concern schools and schooling, and were not liable to pay.

Plaintiff replied — That subsequent to the aforesaid act, in A. D. 1769, said school district had by act of assembly been incorporated with said Chesterfield society for school and for all other society purposes, without exception, and had right to vote with them, and was liable for the debts of said society equally as any other part. The defendants demurred to the reply.

The justice judged the reply to be sufficient. The defendants appealed to the County Court; but there was no certificate that the duty had been paid on the appeal.

The County Court gave judgment — That the plaintiff's reply was insufficient, and for the defendants to recover their cost.

Errors assigned — 1st. That there was no certificate that the duty was paid on the appeal. 2d. That the reply of the plaintiff was sufficient.

Judgment — That there is manifest error in both points assigned for error; for unless the duty is certified the appeal cannot be sustained.

ROGERS v. EXECUTORS OF JAMES ROGERS, DECEASED.

**Appeal from a judgment of the Court of Probate to the next Superior Court good. No duty is required upon an appeal from probate.**

APPEAL from the judgment of the Court of Probate given on the 10th day of July, A. D. 179 ; for allowing in the executor's account a charge for a note, which was given by James Rogers, the son to said deceased, for £163 18s. 3d.; and which for reasons, the executors had delivered up to said James, and charged it in account against the estate.

Plea in abatement — That said judgment was rendered on the 10th of July, and all parties were present, and no appeal was taken until the 10th of September next after. 2d. That no duty had been paid on said appeal.

Judgment — Plea in abatement insufficient. Appeals from the Court of Probate are to be taken to the next Superior Court, where the parties are of age, and were or might have been present at said Court of Probate. On which appeals no duty is required by law to be paid.

HOUGH v. TRACY.

**A party allowed to alter his plea after the case was argued on a demurrer and delivered up to the court for judgment.**

ACTION of *assumpsit*. Plea — That the defendant did not assume and promise within three years before the date and

impetration of the plaintiff's writ, nor was there any note or memorandum thereof made in writing signed by him or any other person in his behalf. To this plea a demurrer was given.

After the demurrer was argued, and the cause delivered to the court, the defendant moved for liberty to alter his plea and plead generally, that he did not assume and promise, which was granted.

### Lawrence v. Gardner.

**A minor's agreeing to pay a note after he is of full age, which was given by him when under age, will support the action.**

**The moral fitness and justice of a thing is a good consideration of a promise to perform it.**

Action on a note for £20 14s. upon interest, dated the 24th of April A. D. 1772.

The defendant plead in bar — That at the time of making and executing said note he was a minor under the age of twenty-one years.

The plaintiff replied — That on the day of after the defendant had arrived to full age he acknowledged the justice of said debt for which said note was given, and in consideration thereof engaged and promised that he would pay said note, if the plaintiff would forbear to sue him. To this reply a demurrer was given.

Judgment — That the reply of the plaintiff is sufficient.

By our statute no person under the government of a parent, guardian or master shall be capable of making any contract or bargain which in the law shall be accounted valid, unless such person be authorized or allowed so to contract or bargain, by his or her parent, guardian or master; in which case such parent, guardian or master shall be bound thereby. In this case it is not alleged that the defendant at the time of giving said note, was under the government of any parent, guardian or master; but only that he was a minor under the age of twenty-one years. The contracts of minors are not void, but are only voidable at their option, when they come of full age. The moral fitness, rectitude and justice of a

thing is a good consideration of a promise to perform that thing. Here the defendant when he had arrived to full age, acknowledged the justice of the debt, for which the note was given, assented to its validity, and promised to pay it.

MANWARING v. DISHON.

**A purchaser under an administrator who sells under an act of assembly for payment of the debts of the deceased, shall prevail against a voluntary deed given in the lifetime of the deceased.**

ACTION of ejectment for a piece of land. Plea — No wrong or disseisin. Issue to the jury.

The plaintiff claimed the land in question, by force of a deed dated the 9th of November A. D. 1739, from his father Richard Manwaring to his son Richard, in consideration of love and good will towards his said son; in which he gave and granted the demanded premises with other lands unto his son Richard and to the heirs male of his body lawfully begotten, and so in the line of his heir male lawfully begotten unto the end of five generations. And in case of failure of issue male of his said son Richard, then to revert to his son Asa, and to the heir male of his body lawfully begotten in like manner; and in case of failure of issue male of said son Asa, to revert to his son Henry and to the heir male of his body lawfully begotten in like manner; and in case of failure of issue male of his said son Henry, to revert to his son Christopher and the heir male of his body lawfully begotten, etc. in like manner.

Richard the grantor afterwards remained in possession of the granted premises for many years until his death; and ever possessed and improved them as his own, and contracted debts after giving said deed to the amount of £40 more than his personal estate would pay; which remained unpaid at his death, having no other lands.

Upon the grantor's death, his son Richard also being dead without issue, his son Asa took administration upon his father's estate, inventoried said land as his father's, considering said deed merely as a testamentary settlement of his estate, and finding the debts contracted as aforesaid to surmount the

personal estate the sum of £40 lawful money; he applied and obtained liberty from the general assembly to sell real estate to pay said debt, and charges of selling; and in pursuance of said act of assembly sold the demanded premises to the defendant, and gave him a deed dated the 5th of March, A. D. 1775; and now said Richard, Asa and Henry being all dead without leaving issue male; the plaintiff claims this land by force of said deed from his father.

The jury found a verdict for the defendant, which was accepted by the court, for the following reasons.

The deed was a voluntary conveyance for love and good will to his sons and their issue; the grantor remained in the possession taking the use and improvement until his death, and contracted debts for necessaries upon the credit of it, for payment of which this land was sold by the administrator, who then was legal owner of the estates under the sanction of an act of assembly to the defendant, which has put the defendant in the place of the creditors, to Richard the father, and makes him a *bona fide* purchaser for a valuable consideration.

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**MIDDLESEX COUNTY, DECEMBER TERM, A. D. 1792.**

CONE v. TRACY.

An agreement executed on one part not within the statute against frauds and perjuries.

The consideration expressed in a deed not conclusive upon the grantor, either as to the sum or the payment.

ACTION of the case, declaring that in A. D. 1788 the plaintiff bargained and sold to the defendant his farm, lying in East Haddam, for £140 lawful money, which the defendant agreed to give for it, and then made and executed to the defendant a deed of said farm at the price aforesaid, and thereupon the defendant became indebted and liable to pay to the plaintiff said sum for said farm, and being so liable in consideration thereof assumed and promised, etc. Plea — *Nonassumpsit.* Issue to the jury.

The defendant objected against the plaintiff's introducing any parol testimony to prove said contract because it was in consideration of land, etc.

By the COURT. The defendant has got a deed of the plaintiff's farm; the contract is executed on one part, which takes it out of the statute made to prevent frauds and perjuries — the case is not within either the letter or the reason of the statute. The evidence was admitted. The case of Brown and wife v. Clark is in point, determined at the adjourned Superior Court, Hartford December A. D. 1777.

TOWN OF KILLINGSWORTH v. TOWN OF GOSHEN.

**Depositions taken within twenty miles of a known attorney to the adverse party without notifying him, although the adverse party lives more than twenty miles off — not admitted.**

ACTION of *assumpsit* for disbursements and expenditures for the support of one Sarah Carter, a pauper, alleged to belong to the town of Goshen. Plea — *Nonassumpsit.* Issue to the jury.

John Allen, Esq. attorney-at-law at Litchfield and attorney to the plaintiffs, lived within six miles of Goshen, of which the defendants were informed and who notified said Allen to attend at the taking of their depositions; afterwards the defendants took supplementary depositions of some of the same witnesses, and also of other witnesses without notifying said Allen — which depositions were objected to because said Allen was not notified, and by the court not admitted. See Williams v. Fitch, Windham September Term, A. D. 1791.

BOW v. PARSONS, SHERIFF.

**Parol evidence admitted to prove a witness to be an infidel.**

ACTION for the escape of Gordon Whitmore, who was in prison upon an execution. Case was defaulted and heard in damages.

The defendant produced a receipt under the hand of the plaintiff given subsequent to the date of said execution, to said Gordon purporting to be for £78, which the plaintiff

claimed to have been given for only £8. Said receipt was witnessed by one Stephen Freeman, who the plaintiff offered as a witness to prove that it was given for only £8. The defendant objected to his being admitted, that he was an infidel and disbelieved the being of a God, and of revealed religion.

The court admitted parol testimony of particular conversations and declarations to evince his infidelity. The objection not being supported he was admitted.

PARSONS, LATE SHERIFF, v. PHILLIPS ET AL.

Receiptsmen for goods attached, are not bound to hold them from the debtor more than sixty days from the judgment, unless demanded within that time.

ACTION upon a receipt given for goods taken by an attachment, declaring that on the 21st day of August A. D. 1786, by virtue of a writ of attachment in favor of Charles Sigourney against William Richards and Samuel Buel for £400 lawful money, the plaintiff attached certain goods, wares, etc. the property of said Richards, viz. (describes them,) to the amount of £400 lawful money; that he delivered said goods to the defendants upon their request to keep and return, and thereupon the defendants executed their receipt to the plaintiff, dated the 21st day of August A. D. 1786, therein promising to redeliver all said goods to the plaintiff when required; that he made return of said writ with his doings thereon, properly indorsed, to the County Court holden at Middletown in and for the county of Middlesex, on the second Tuesday of December A. D. 1786 — which action was duly entered in the docket of said court and by sundry legal removes came to the Superior Court, holden at Haddam on the second Tuesday of January A. D. 1790, when and where said Sigourney, by the consideration of said court, recovered judgment in said action against said Richards and Buel for £290 1s. 6½d. lawful money damages and his cost.

That said Richards immediately after said judgment was entered up against him and said Buel, prayed out a writ of error against said judgment before any execution was taken

out thereon, dated the 27th of February A. D. 1790, properly signed, etc. returnable before the Supreme Court of Errors, to be holden at Hartford on the Tuesday of the week preceding the second Thursday of May A. D. 1790 — which on the 6th of March after, was duly served on the plaintiff and returned to said Supreme Court, and was continued to the session of said court in October A. D. 1790, when said court gave judgment that there was nothing erroneous in the judgment of the Superior Court, and execution was taken out upon said judgment of the Superior Court, dated the 16th day of October A. D. 1790 and directed in common and legal form and delivered to the sheriff to serve and return, and on the 29th day of said October he made return that he had made demand of said William W. Parsons, late sheriff, also of said William Richards for said goods, etc. but none were shown, nor could he find any whereon to levy said execution.

That thereupon said Sigourney instituted his suit against the plaintiff for not delivering said goods, etc. per writ dated 29th of October 1790, to the City Court, holden on the second Tuesday of November in said city of Middletown, and before said court recovered judgment for the sum of £303 lawful money damages and cost, which the plaintiff had been compelled to pay; that on the 29th of October A. D. 1790 the plaintiff made special demand of the defendants for said goods; that they had never delivered them, nor paid said Sigourney's execution — damage £400.

Plea in bar — That no execution was ever taken out on said judgment of the Superior Court, rendered on the second Tuesday of January A. D. 1790 until the 16th day of October 1790, and that no request or demand was ever made of the defendants for said goods, etc. until on the 29th of said October and that the judgment of the Supreme Court of Errors affirming the judgment of the Superior Court, was entered up, on the 12th of October A. D. 1790, and that more than sixty days had elapsed from the entering up said final judgment in the Superior Court on the second Tuesday of January 1790 and the 29th of October A. D. 1790, when said goods, etc. were first demanded of the defendants; and the defendants having previous to that time delivered them

to said Richards the original owner, upon his request, as by law they were obliged to do; that they offered to defend the plaintiff against the suit of said Sigourney, but he refused and suffered judgment against him by default. Plaintiff demurred.

Judgment — That the plea in bar is sufficient.

The statute is that no personal estate attached, shall be held to respond the judgment obtained by the plaintiff, at whose suit the same is attached, either against the debtor or any other creditor, unless such judgment creditor take out execution on such judgment, and have the same levied within sixty days after final judgment. The writ of error was no *supersedeas* to the plaintiff's proceeding, till served on the 6th of March, nor after the judgment in the Supreme Court of Errors was rendered; so that the plaintiff had more than sixty days clear of any incumbrance from the writ of error in which to have levied his execution. But having neglected to do it, and the defendants having delivered the goods to Richards the owner, the plaintiff was not liable to the creditor, and his remedy was by a new trial.

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**NEW HAVEN COUNTY, JANUARY TERM, A. D. 1793.**

COOK ET UX. V. EPHRAIM BEACHER ET AL., HEIRS OF ELIPHALET BEACHER.

In chancery whoever claims in right of another, must show that he from whom he claims had good right, and that he has good authority to claim his right.

PETITION in chancery, showing that on the 10th of February A. D. 1779, on a settlement of accounts between Reuben Beacher, executor of Eliphalet Beacher and Joshua Chandler, there was found due from the estate of said Eliphalet to said Joshua, a greater sum than was due from Samuel Cook deceased, to the estate of said Eliphalet, upon a mortgage given by said Samuel to said Eliphalet, on the 14th of February

A. D. 1761, as collateral security for a debt of £70 lawful money; and as said Chandler had not then taken the oath of fidelity to the United States, he could not take a deed, it was agreed by said Joshua to accept a deed of said mortgaged premises, in satisfaction of said balance, and said Reuben Beacher, executor of said Eliphalet, gave a bond to give or procure a deed of said premises, whenever he should become qualified to receive it — which bond was lost or mislaid.

That said Chandler at the same time was indebted to said Samuel Cook for moneys received of him to a greater amount than was due on said mortgage, and it was agreed by said Chandler that he would procure a deed of said mortgaged premises and convey them to said Samuel in payment of what he owed him; that said Chandler soon after went off with the enemy and was since dead and insolvent, having never received anything towards his debt from said Beacher, nor ever paid anything on account of said debt to said Cook — and said Samuel relying on said agreement, did not exhibit his said claim to the commissioners on said Chandler's estate; that the petitioners were the rightful heirs of said Samuel Cook; that said Reuben Beacher was dead, and that said Sarah the wife of said Ephraim Beacher and the other petitionees were the heirs of the said Eliphalet Beacher, and as such had recovered said mortgaged premises, at law, from the petitioners — praying that the petitionees might be ordered and decreed to convey said premises to the petitioners, in satisfaction of the debt due from said Eliphalet to said Chandler, and also in satisfaction of the debt due from said Chandler to the estate of said Samuel Cook, of whom the petitioners were the legal representatives, agreeable to said bond from Reuben Beacher, executor aforesaid, to said Chandler, and said Chandler's agreement with said Samuel Cook.

Plea in abatement — That the facts stated in said petition did not lay a foundation for the relief asked for.

Judgment — That the plea in abatement is sufficient. The petitioners' claim against the petitionees, is in Chandler's

right, without showing any good right Chandler has or ever had. They say he had a bond from the executor, but that it is lost or mislaid, without alleging any proof they have of the fact, which is not a sufficient reason for not producing it.

Further, they show no authority from Chandler to claim a deed from the petitionees in his behalf; nor do they show any ground of claim upon said Chandler, but a naked parol agreement to procure a deed of said premises, and convey them to the said Samuel, which will not warrant any suit in chancery for the relief prayed for.

STATE v. GARDNER.

**Information for the adultery of the wife, the husband cannot be a witness.**

**A person who has been convicted of a theft excluded from testifying.**

INFORMATION for adultery, committed with Anna Clark, the wife of Samuel Clark. Trial to the jury.

The attorney for the state offered Samuel Clark the husband of said Anna, as a witness, to prove the fact. He was objected against, that the guilt of the prisoner necessarily involved the guilt of the said Anna, who was the wife of said Samuel; and that the husband cannot be a witness for or against his wife.

By the COURT. He cannot be admitted. In a prosecution against the wife, clearly he could not be a witness, and in testifying to the criminality of the prisoner he must necessarily testify to the criminality of his wife; further he may be interested in laying a foundation by his testimony, for a divorce.

A woman was then offered as a witness, who had been convicted before a justice for stealing some flour, was found guilty and adjudged to pay four shillings, the three-fold damages; the record was produced, and upon objection, was excluded as being infamous.

SHERMAN v. SHERMAN.

A witness who has received communications from the party under an engagement to secrecy, except in case of an attorney, is obliged to testify all he knows when called as a witness.

PETITION for a divorce, for the cause of adultery. Doctor Ives was produced as a witness on the part of the petitioner, and was objected against, because all he could testify came to his knowledge in confidence, and under obligation of secrecy. The objection was judged to be insufficient. See Mills v. Griswold, Litchfield January Term, A. D. 1792.

APPLE v. RUSSEL & PARISH.

On a several plea to the jury — one of the defendants is acquitted and recovers his own cost, his witnesses and half the court and jury's fees paid, and for one attorney.

ACTION of trover for a quarter of a vessel taken by execution, and sold to Russel who was the creditor, who sold the vessel and received the money for her; Parish was the officer that took the vessel by Russel's direction. The defendants severally plead not guilty. Issue to the jury. The jury found Russel guilty, and Parish not guilty.

The court taxed for Parish his own cost, and for his own witnesses; also half of the court and jury fees which he paid, and one attorney's fee.

CLARK v. SAMUEL & WILLIAM HELMS.

An action cannot be said to be commenced, until service is made upon the defendants.

Where one defendant dies before service upon either, the action does not survive.

ACTION of debt by book against both, as merchants in company, describing them to belong to New Haven; per writ dated the 21st of November A. D. 1791.

Service returned upon the writ — New Haven, December 26th, 1791, Then I attached the body of Samuel Helms within named, read this writ in his hearing, and have taken sufficient bonds for his appearance at court, etc.

Samuel Helms plead in abatement — That said William Helms the other defendant named in the plaintiff's writ, died

on the 20th of December A. D. 1791, and so was dead before, and on said 26th of December when said writ was served on him. Plaintiff demurred.

Judgment — That the plea in abatement is sufficient. In this case, service upon both of the defendants is necessary; and no service having been made upon either until after William's death, the action cannot be said to have been commenced in his lifetime, although the writ was prayed out before; and not having been commenced in the life of said William, it doth not survive against the surviving defendant.

### Burk v. Phips.

**An action will not lie in favor of a mother as a mother, for the service of a minor son, where it does not appear but what the father is living.**

Action of the case; declaring that on or about the 1st of March last past, her son Edward Burk, a minor about sixteen years of age, being on board of the defendant's vessel at Charleston, in South Carolina, as a seaman, for a voyage of three months at customary wages; the defendant sold and executed a bill of sale or indenture of said Edward, to one Thomas Thomas for a term of years, and compelled him to enter on board said Thomas's vessel, bound to foreign parts, contrary to the mind and will of the plaintiff, or of said Edward; whereby she is deprived of the person, service, and company of her said son, to her damage £1,500; per writ dated 4th of April A. D. 1792. Plea — Not guilty. Issue to the jury. Verdict for the plaintiff, and £15 damages.

The defendant moved in arrest of judgment the insufficiency of the plaintiff's declaration.

Motion in arrest adjudged sufficient — 1st. There is no averment in the declaration that the plaintiff is a *feme sole*, or but that said Edward's father is living. 2d. It doth not appear that she was guardian or any way entitled to the services of said boy; that as mother she is not, which differs the case from that of a father's commencing the action, for he is the natural guardian of his minor children, and entitled to their services.

FRANKLIN v. LARABEE.

A garnishee who holds property which by a fraudulent conveyance from the debtor, is conveyed to another, is liable for the property he holds as the property of the absconding debtor.

SCIRE FACIAS against him as agent, factor, and trustee to Doct. Carrington, an absent absconding debtor; alleging, that a copy was left with him in service on the 24th of March, A. D. 1790; that he recovered judgment in said suit against said Carrington for £ on which execution was granted, and had been returned *non est inventus;* alleging that the defendant was agent, factor, etc. to said Carrington, when said copy was left in service, and had of his effects in his hands, etc.

The defendant plead in bar — That on the 14th of March, A. D. 1790, said Carrington by a bill of sale made over and mortgaged to Mark Leavensworth, who was a creditor to said Carrington, one vessel and a part of another; also all his part of the cargo in his possession; that said vessels were delivered to Mr. Dickerson at a valuation in satisfaction of a debt due to him from said Carrington; and that said cargo still remained in the defendant's possession for said Leavensworth.

The plaintiff replied — That said bill of sale was fraudulent, and made to said Leavensworth in trust to defeat creditors of their just dues; upon which the parties were at issue to the court.

The case was — After Carrington became in failing circumstances, he made a bill of sale of this property to Leavensworth, in trust to pay his creditors by his order, and to account to him for the surplus; Dickerson had been paid his debt by the vessels. Nothing that Carrington had said subsequent to the giving of the bill of sale was admitted to be given in evidence.

The court found said bill of sale to be fraudulent, and made in trust to defeat creditors.

Every creditor is entitled to the remedies which the law provides, to secure and to recover his dues from his debtor; and for a debtor who is insolvent or in failing circumstances, to convey away his estate, to defeat his creditors of their legal

remedy, is a fraud upon both the law and the creditors. If the laws of Connecticut in this respect, are not so equal in the opinion of some, as they might be, it doth not alter the case; for every citizen is entitled to the benefits and remedies which the law gives him. See Samuel Brown's Executors v. Burrel, Fairfield January Term, A. D. 1791.

BARNEY v. CUTTLER & MOULTROP.

A defendant against whom there is no evidence and is discharged from any interest may have his name erased from the writ and be a witness.

An execution not recorded in the office from whence it issued although recorded in the records of the town clerk, cannot be revived as evidence of title.

A party not prejudiced by a fraudulent conveyance cannot take advantage of it — administrators and executors who sell land by order of the general assembly, or of the Court of Probate, are not within either the letter or reason of the law, against conveying lands of which the grantor is disseized, etc.

ACTION of ejectment for a piece of land in New Haven. Plea — No wrong or disseisin. Issue to the jury.

The land was originally Jonathan Mix's, was attached by Joseph Adams on the 26th of January A. D. 1776; judgment obtained and execution levied on the 21st of May, A. D. 1776; Adams died insolvent, and his executors sold this land by order of the Court of Probate to the plaintiff, on the 19th of March, A. D. 1791.

After Adams had attached the land as aforesaid, and before he had levied his execution upon it, Abraham Austin levied an execution upon it for a debt due to him from said Jonathan Mix; Austin then sold and conveyed it to Moultrop one of the defendants, who paid the consideration money to said Adams for a debt said Austin owed him; Moultrop then gave a deed of it to Cuttler the other defendant, and Cuttler entered into possession, and was in holding and claiming the same as his own, when the executors of said Adams gave a deed of it to the plaintiff.

There being no evidence against Moultrop one of the defendants, and Cuttler having given him a discharge from the

covenants in his deed, and of all actions and causes of action on that account, moved that his name might be struck out of the writ and admitted as a witness, which was accordingly done.

The defendant offered a copy of Abraham Austin's execution and levy, recorded in the record in the town of New Haven, which had been returned to the clerk of the County Court from whence it issued, but not recorded; upon objection made to it on that account, the court ruled it not to be admissible to the jury.

The jury brought in a verdict for the defendant, and the court thereupon gave their opinion upon the law in the case, with their reasons.

The defendant rests his defense upon two points; the first is — a fraud practiced by Adams upon Moultrop in the transaction.

By the COURT. Be this as it may no person can avail himself of a fraud, but he who is prejudiced by it; the defendant's title in this case, cannot be affected by it, for he has got none; his execution and levy having never been recorded in the records of the County Court from whence it issued.

The second is — the statute law of the state by which it is enacted "That all bargains, sales, leases, or other alienations, etc. of lands, tenements, or hereditaments whereof the lessor, vendor, grantor, or the person who doth execute any instrument in writing transferring any right or title to lands, etc. to another person, the present possessor thereof only excepted; is disseized or ousted of the possession thereof, by the entry or possession of any other person or persons, shall be null and void and of no effect in the law," etc. And the statute makes it highly penal for any person to give or receive any deed under the circumstances aforesaid. And when the deed from the executors of said Adams was given to the plaintiff they were disseized and ousted of the possession by the entry and possession of the defendant.

By the COURT. Executors and administrators are officers of trust, and act by virtue of their power; and when they sell

and give deeds of land in their official character, pursuant to orders from the general assembly or the Court of Probate, they are not within either the letter or reason of that law.

The preamble of the statute is — This assembly observing the growing inconveniency in the government, by means of many taking in hand, bearing up, or upholding of quarrels, and sides, etc. Further this is a penal statute, and is to be construed strictly; those who counteract the purview of the statute, are within the penalty.

Guardians who give deeds of the lands of their wards, pursuant to a decree of a court of chancery — executors, etc. who give deeds of the lands of the deceased by order of the assembly or of the Court of Probate — and collectors who sell lands for payment of taxes by order of law — and the treasurer who gives deeds of land belonging to the state, cannot be said to be seized or disseized of the lands, they undertake to convey; who do not act in their own right, or by virtue of any interest they have, but wholly by public authority, cannot be considered as being in any sense within the statute: Besides, most of them are under injunctions to convey in a limited time which would render the performance of their duty impracticable if it was necessary, in such cases, that possession should be recovered, before a sale would be valid.

The case of Daniels v. Avery, adjudged at New London in A. D. 1785, where the deed of an administrator upon an insolvent estate was adjudged to be void by force of the statute, because a third person was in holding and claiming the lands against the administrator, is but a single decision, and cannot be the true meaning and construction of the law. See Allin et al. v. Hoyt, Kirby's Rep. 221.

## Hobert v. Kimberly.

**A note for public securities is to be estimated at their value when payable, and the payments at the time when made.**

Action on note, dated the 1st of February A. D. 1789, for £143 16s. 2d. state securities, payable the 1st of February A. D. 1790. Case was defaulted, and heard in damages.

There were several payments made upon the note in state notes in 1790 and 1791. The court estimated the note at the value of securities when payable, and the payments at the value of the securities when paid, and gave judgment accordingly.

HOUGH v. IVES.

A recovery against the mortgagor will not affect the title of the mortgagee.

An absolute deed with a private defeasance is fraudulent as to creditors and purchasers.

ACTION of ejectment for a piece of land. Plea — No wrong or disseisin. Issue to the court. The plaintiff's title was the levy of an execution against the defendant, made the 7th of November A. D. 1791.

The defendant set up title under a deed from himself to one Carter, dated the 6th of May, A. D. 1786, at which time Carter gave him a writing in nature of a defeasance to said deed; that if Ives paid a certain execution in favor of Leavensworth, against said Carter for £ within two months, the deed should be void; if not then said Carter was to sell enough of said land to pay said execution and cost, and return the surplus. It appeared that Ives had paid said execution by the hand of Esquire Hall.

The court found that the defendant had done wrong, etc. and gave judgment for the plaintiff to recover; and that upon two grounds. 1st. This recovery will not affect Carter's right or interest whatever it may be. 2d. The defeasance was a private transaction between the parties, and however it may be obligatory upon them, is fraudulent as to creditors, and the land is liable to be taken as Ives's estate, notwithstanding the deed to Carter, which appeared to be an absolute deed, when it was a deed in trust, and imported a falsehood upon the record: Further it appeared that the condition in the defeasance was performed by payment to Leavensworth.

FAIRFIELD COUNTY, JANUARY TERM, A. D. 1793.

HILLYARD v. NICHOLS.

Depositions taken within twenty miles of the defendant's known attorneys without citing either, not admitted.

An action upon a statute to recover a penalty, is within the law enabling the court to return the jury to a second and third consideration.

ACTION upon the statute, to recover the penalty of £200 for exporting two negro children out of the state, who were entitled to their freedom at the age of twenty-five years. Plea — Not guilty. Issue to the jury.

The plaintiff offered certain depositions taken at Newtown, within twenty miles of Messrs. Benedict and Edmund, known attorneys to the defendant, who was then out of this state, without citing either. Upon being objected to, were rejected by the court. See the Town of Dillingworth v. Town of Goshen, Middlesex county, December Term, A. D. 1792. The jury found a verdict for the defendant.

By the COURT. This is an action to recover the penalty incurred by the breach of a public statute, given to the plaintiff, in which all the forms of proceeding are as in civil actions, and the court hath the same power to return the jury to a second and third consideration, as in any action whatever.

HALL v. ———.

A note expressed to be for £55 lawful money payable in one shilling orders at their value in A. D. 1785, is a note for £55 lawful money, payable in said orders at their value in 1785.

ACTION upon a note, dated the 29th of October 1787, for £55 lawful money, to be paid in one shilling orders, at their value in May, A. D. 1785. The case was defaulted, and heard in damages.

The question made in this case was — Whether this note was for £55 lawful money, payable in one shilling orders, at their value in May 1785; or for £55 in one shilling orders at their value in A. D. 1785.

By the COURT. The note is for £55 lawful money, payable in one shilling orders at their value in A. D. 1785, and gave judgment accordingly for the £55, without regard to said one shilling orders, as none had been paid or tendered.

HAWLEY v. BROWN.

An executor may be a witness to a will.

APPEAL from a judgment of the Court of Probate in approving the will of Hawley deceased. 1st. Because the testator was insane. 2d. Because he attempted to entail his estate beyond what the law would allow. And 3d. Because one of the witnesses to the will was the wife of James Deavenport, Esq. who was appointed executor of said will.

The executor exhibited the will for probate and refused the trust, and an administrator was appointed with the will annexed. The executor has no interest but a trust.

The first reason was judged not to be true; the second and third to be insufficient.

SHERIFF ABEL v. GODFEY & NASH.

The statute in favor of poor prisoners who have taken the oath is to have a reasonable construction.

ACTION upon a note for £50, dated 18th of January 1788.

Plea in bar — That having prayed oyer of said note it hath conditions thereto annexed, which are as follows, viz. Whereas said Godfrey is imprisoned on an execution in favor of M'Donald against him for £ ; now if the said Godfrey shall abide a true and faithful prisoner on said execution, until released by due order of law, then said note shall be void, etc. and that said Godfrey did abide a true and faithful prisoner on said execution.

The plaintiff replied — That said Godfrey did not abide a true and faithful prisoner on said execution, but on the 7th day of February did make his escape from gaol without the consent of said gaoler.

The defendant rejoined — That on the 31st of January A. D. 1788, between the hours of four and five o'clock in the afternoon, said Godfrey took the oath provided for poor imprisoned debtors, and continued in gaol until after breakfast on the 8th day of February A. D. 1788 and between the hours of nine and ten o'clock A. M. of said day, there being

no money left for his support, he went out of gaol, with the consent and permission of the gaoler as well he might, which is the same escaping from prison alleged in the plaintiff's reply.

The plaintiff sur-rejoined — That the allowance per week for such debtors was five shillings six pence, and that said Godfrey took said oath at four o'clock on said 31st of January at which time the creditor paid to said gaoler six shillings for his support, and said money was not expended when said Godfrey made his escape from prison — without that that said Godfrey continued in gaol until between the hours of 9 and 10 A. M. of the 8th of said February and did then go out of gaol with the consent and permission of the gaoler.

The defendant rebutted — That said Godfrey did continue in gaol until between the hours of 9 and 10 A. M. of the 8th of said February and then went out with the consent and permission of the gaoler. Issue to the jury.

The jury found that said Godfrey did continue in gaol until the 8th of February A. D. 1788, and between the hours of 9 and 10 A. M. of said day went out of gaol without the consent and permission of the gaoler and found for plaintiff £50.

The defendant moved in arrest — That the issue was immaterial; for that said Godfrey had right to go out of gaol when he did without the consent of the gaoler.

By the COURT. The motion in arrest is insufficient and the plaintiff must have judgment.

The statute is to have a reasonable construction, and although made upon principles of humanity of poor imprisoned debtors, yet it is not to be so construed as to become a trap to defraud the creditor. The money left was sufficient to pay for his breakfast, and he could not be in want of support until that was digested. See Sheriff Fitch v. Cook, New Haven, August Term, 1791.

NICHOLS V. BALDWIN ET AL.

Where there are several defendants in a prosecution, and several judgments in the County Court, part of whom bring a writ of error and have the judgments reversed as to them; and the plaintiff enters his original cause, the defendants who were not parties to the writ of error, are not before the court.

THE case was — Nichols brought a petition to the County Court, showing that old Mr. Hurd, his wife's father was impotent and poor; that he had expended large sums in supporting him; that Foot and Sherman married two other of said Hurd's daughters, and that said Baldwins were his grandsons by another daughter, and were all of ability and ought to contribute towards the support of Hurd.

The County Court ordered that said Foot and Sherman and their wives should contribute to the support of their father Hurd; but made no order respecting the Baldwins.

Foot and Sherman and their wives brought a writ of error to the Superior Court, complaining of the order of the County Court, in which the Baldwins were not made parties; the judgment of the County Court with respect to them, said Foot and Sherman and wives was reversed, and Nichols entered his original process in this court.

Foot and Sherman plead in abatement — That their wives had never received any property from their father Hurd; that they were not holden to contribute to the support of their wives' father. Judgment — Plea in abatement sufficient.

Nichols then moved for a citation to cite in the Baldwins to show reason why they should not contribute to the support of their grandfather Hurd. A citation issued from the clerk and was served. They now appeared and plead in abatement, therein setting forth the original process, this citation and service, and thereupon say that they are not holden to make answer to said original petition and process. Mack v. Parsons, etc. Kirby's Rep. 155.

The plea in abatement was judged to be sufficient, upon the ground that there were no parties before this court, but those who were parties to the writ of error; that there was no cause here but that which was brought up by the writ of

error and reversed; that the Baldwins were not parties to the writ of error, nor was the cause as it respected them, brought up by the writ of error.

SELECT v. OLMSTEAD.

**That which is necessarily implied need not be expressed.**

ACTION brought against the executor for rates due from his testator.

Plea in abatement — That there is a material variance between the original writ and the copy left in service; for that it is averred in the original writ that the rates due from the deceased were £13 16s., and that in said copy there is no such averment.

The plaintiff replied — That said writ was legally served on the defendant by reading — without that that it was no otherwise served than by said copy.

The defendant rejoined — That said writ was not legally served on him by reading. Issue to the court.

The writ was dated the 30th of December A. D. 1792 and made returnable to the County Court to be holden in March then next; the officer's indorsement returned upon the writ was, that on the 30th of December he served said writ by reading it in the defendant's hearing, omitting the year.

The court found that it was legally served on the defendant by reading; for although the officer in his return has omitted the year it is necessarily implied, as no other December intervened, between the date of the writ and the return day.

LOCKWOOD, ADMINISTRATOR OF GUYER, v. SMITH.

**A note for a sum of money with an agreement indorsed on the back, that if the defendant give a deed of a certain piece of land, said note to be void — is a note for so much money and recoverable, unless said deed is given.**

ACTION on note, dated the 13th of October A. D. 1787 for £40, payable to said Guyer on demand with interest.

Plea in bar — That there was a condition indorsed on the back of said note; that if the defendant should give to said Guyer a deed of a certain house and five acres of land in

Reading, by the 1st day of April then next, said note should be void; and that before said 1st of April, viz. on the 5th of January A. D. 1788, the said Guyer died, whereby it became impossible by the act of God for the defendant to perform said condition. The plaintiff demurred.

Judgment — That the plea is insufficient.

Two questions were made — 1st. Whether this was a penal note, executed to enforce the giving of said deed? Or, 2d. A note given for so much money, and by the indorsement agreed to be paid and discharged by said deed?

The court were of opinion that it was a note for so much money, which by the agreement indorsed on the back of it, might have been discharged by executing said deed. Further, it doth not appear but that said Guyer left heirs to whom said deed might have been given.

SHERWOOD v. HUBBEL.

A copy of a deed from the record, admissible in the trial of the title to lands.

A discharge given to the grantor of lands by the grantee, who has conveyed to other persons with warranty, doth not remove his interest.

ACTION on the covenants of seisin, in a deed dated the 17th of February A. D. 1786, alleging that the defendant was not seized of said lands, but that one William Dunscomb was seized at the time of executing said deed.

Plea in bar — That the defendant was well seized of said land on the 17th of February A. D. 1786 — without that that said William Dunscomb was seized. Issue to the jury.

The plaintiff offered in evidence a copy of a deed from the records, of said land to William Dunscomb, to prove that the title was in him. To which it was objected that the original ought to be produced.

By the COURT. It being an authenticated copy of record it is legal evidence, and it being the best evidence the nature of the case admits of; the original is the property and in the possession of said Dunscomb and the plaintiff hath it not in his power to produce it.

John Dunscomb conveyed this land to the defendant with warranty, and the defendant had sold and conveyed parcels of the same land with warranty to other people. The defendant executed and delivered to said John Dunscomb a discharge from his covenants in said deed, and of all actions and causes of action on that account; and moved that he might be sworn as a witness.

By the COURT. He is still interested; for the defendant's discharge will be no bar to his grantees bringing an action against said Dunscomb, upon his covenants, as assigns to the defendant for the land conveyed to them.

BEARDSLY & MALLET v. CURTICE.

**Chancery will not interpose where it appears that the petitioner has adequate remedy at law.**

PETITION in chancery, showing that on the 13th of May A. D. 1789, said Curtice gave to the petitioners and Matthew Mallet, a minor, a deed of twenty-two acres of land, to which he had no good title, for which they gave three notes, viz. Henry Beardsly one for £44, Salmon Mallet one for £44, and said Henry Salmon and Matthew one jointly for £44, all payable the 1st of April A. D. 1793 with interest; that afterwards and before said deed was recorded, it was agreed to throw up said bargain, they to deliver up said deed and said Curtice to deliver up said notes, and on the 11th of June A. D. 1789, they came together for that purpose; said Curtice pretended he had not got said joint note and executed a discharge from it, which with said deed and two separate notes were laid on the table; that said Curtice fraudulently catched up said deed and said discharge and carried them off, refusing to redeliver them to the petitioners, and had instituted a suit upon said joint note which was discharged, and had brought actions of trover for said separate notes, which the petitioners took up, and threatened to ruin the petitioners by suits in the law concerning said land, the title to which had been found and adjudged by court and jury not to have been in him at the time he gave said deed, but to the petitioners, and that he

was unable to pay a bill of cost — and pray that a perpetual injunction be laid upon said Curtice, not to prosecute any suit or suits upon said joint note, or for said separate notes, or for the recovery of said land.

The respondent plead in abatement — That said petition did not contain proper and sufficient grounds for a decree in chancery.

Judgment of the court — That the plea is sufficient; for that the petitioners have adequate remedy at law for all the matters complained of.

## Franklin v. Cannon.

**If a deed, after it is received and entered upon, received for record, remains unrecorded through no fault of the grantee, he is not to be prejudiced by it.**

**Altering the security of a debt doth not remove the lien on land mortgaged for payment.**

Action of ejectment for a tract of land. Plea — No wrong or disseisin. Issue to the jury.

The plaintiff attached this land as the property of Quintard, recovered judgment and had execution against him and had it levied upon the land in July A. D. 1790. This was his title.

The defendant set up a mortgage deed from said Quintard, dated the 3d of April A. D. 1773, conditioned to pay £215 17s. York money by 1st of March 1774; the deed was carried to the town register soon after it was executed and entered upon, received for record, and lay upon file in said register's office, after the plaintiff attached said land and before judgment was recovered, said deed was recorded at full length, and no reason was assigned why it was not sooner recorded. The original security for said £215 17s. did not appear, but a note was produced, dated the 4th of April A. D. 1786 for £52 lawful money, on which was a memorandum written, that when said note was paid, it being the balance due, said mortgage was to be void. Quintard ever remained in possession of the premises.

The jury found a verdict for the defendant, which was accepted by the court.

It did not appear in this case that the defendant was anywise the cause of said deed's remaining so long unrecorded, or but that it was owing to the negligence of the town clerk. The new note for £52 lawful money appeared to be a part of the original mortgage money, and the changing of the security had not discharged the debt nor altered the lien upon the land.

MALLET v. MALLET.

A witness being interrogated under the witnesses' oath and purgeth himself, the party may not resort to other proof.

ACTION of ejectment. Issue to the jury. A witness was produced and sworn and under the witnesses' oath he was examined touching his interest and purged himself; the party then moved to introduce witnesses to prove his interest; but by the court — this may not be done.

The party has his election, either to prove the interest by common-law evidence, or to appeal to the witness to declare, under the *voire dire* or witnesses' oath, whether he is interested or not; but after he has appealed to the witness and examined him, he may not resort to common-law evidence to criminate him.

KNAP v. SACKET.

A person who has executed a bill of sale in the name of another, shall not be admitted to testify he had no right to do it.

A writing witnessed by subscribing witnesses must be proved by them if to be had.

ACTION of trover for a vessel. Issue to the jury. The dispute was respecting the property.

Underhill of New York, owned the vessel; the plaintiff claimed her by virtue of a bill of sale from Close, captain of the vessel and agent for said Underhill; the defendant set up title to her in virtue of a purchase from said Underhill, subsequent to the bill of sale from Close — whose power of agency and right to sell was drawn in question. And the defendant moved that Close might be sworn as a witness; but by the court was not admitted, for after he has executed a bill of sale in the name of Underhill, it shall not lie in his power to swear that he had no right to do it.

The defendant offered a bill of sale of said vessel, witnessed by two subscribing witnesses — which was denied to be genuine. The defendant offered to prove the execution by comparison of the handwriting — but by the court, it will not do to admit the lowest kind of evidence to authenticate a deed, when it is apparent that the party has better evidence in his power, which might have been produced. The bill of sale was rejected.

SHERIFF ABEL v. FORGUE.

What one co-obligor has said who is not sued, cannot be given in evidence against the other.

The creditor consenting to the release of one joint debtor is a release of both.

ACTION of debt on a bond for £100, dated the 12th of October 1791, wherein the defendant with Hannah Bulkley, bound themselves jointly and severally to the plaintiff, upon the following condition; that whereas Jonathan Bulkley and Francis Forgue, are in prison upon an execution in favor of Aaron Hawley against them, for £24 debt, and £13 16s. 3d. cost, which is dated the 20th of August 1791; now if the said Jonathan and Francis shall abide true and faithful prisoners until legally discharged then said bond is to be void: Breach alleged, that said Francis on the 14th of January A. D. 1792, made his escape from gaol without consent of the plaintiff and the gaoler, and that said execution and bond remained unpaid and unsatisfied.

The defendant plead in bar — That on the 4th of November A. D. 1791, the said Jonathan and Francis being joint debtors imprisoned on said execution, the plaintiff agreed with said Hannah that in case she would pay to him £15 he would consent that said Jonathan should go out of prison; and that he would never make any demand upon her or the said Jonathan on account of said execution or said bond, or in any way or manner sue them, or either of them; and the said Hannah did then and there pay and secure to the plaintiff said sum of £15 which he accepted and thereupon and in consideration thereof did give to the said Jonathan liberty and license to depart from said gaol, and from his imprisonment on said execution,

and to go wheresoever he pleased; and the said Jonathan did on said 4th of November depart from gaol, and from his imprisonment with the free consent of the plaintiff; and said Francis afterwards, viz. on the 14th of January A. D. 1792, departed from said gaol and his imprisonment, as well he might.

The plaintiff replied — Traversing the agreement alleged in the defendant's plea to have been made with said Hannah; also said Jonathan's departing from gaol with his consent on the 4th of November A. D. 1791.

The defendant rejoined, affirming her plea in bar, upon which issue was joined to the jury.

The jury found the facts alleged in the plea in bar, and for the defendant to recover her cost.

On the trial the plaintiff offered to prove what said Hannah had said, but by the court was not permitted; she is not a party to the suit, and what one co-obligor has said cannot be evidence against the other.

The plaintiff moved in arrest of judgment, that said issue was immaterial.

By the Court. The motion in arrest is insufficient, and the defendant must have judgment. The plaintiff's consenting to the release of said Jonathan from imprisonment on said execution was a discharge of said Francis. For where two are jointly charged and imprisoned on an execution, the creditor's consenting to the release of one, is a discharge of both.

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**LITCHFIELD COUNTY, JANUARY TERM, A. D. 1793.**

IVES v. D'WOLF.

**A plea of *non est factum* to a note to which no answer is given, cannot be judged insufficient.**

Error to reverse a judgment of a justice in an action, brought by D'Wolf v. Ives on a note for £5, dated the 6th of May, A. D. 1791.

The defendant plead — That the note on which, etc. was not his act and deed. To which plea the plaintiff gave no answer.

The justice gave judgment — That the defendant's plea was insufficient, and for the plaintiff to recover.

Error assigned — That said justice ought to have answered to the facts in the plea; or if he considered it as demurred to, to have given judgment that said plea was sufficient.

Judgment — Manifest error, for the reasons assigned.

JOHNSON v. HILLS.

**A writ directed to an indifferent person by name, without describing his place of abode, is good.**

WRIT OF ERROR to reverse a judgment of the County Court in an action Johnson v. Hills, by writ directed in the words following, viz. Whereas no proper officer can be had to serve this writ, without great charge and inconvenience, this writ is directed to Roger Cogswell an indifferent person to serve and return.

Plea in abatement — That Roger Cogswell to whom this writ was directed was not described of any place, town, county, or state; whereas he was of Washington in the county of Litchfield. Demurrer.

Judgment — That the plea is sufficient.

Error assigned — That said plea was insufficient, and ought so to have been adjudged.

Judgment — Manifest error. The statute requires that the authority signing the writ shall insert the name of the indifferent person, and the reasons of the direction, without anything more; if this is too loose, the legislature will correct it.

NEWHAL v. WADHAMS.

**A witness's saying that he would swear anything, goes only to his credit.**

ACTION for a fraud in the sale of a horse. Issue to the jury. The defendant offered to prove that one of the plaintiff's witnesses had declared that he would swear to anything, if he could get six shillings by it.

The evidence was admitted, as it went to lessen the weight of his testimony.

DUTTON v. COUNTY OF LITCHFIELD.

ACTION declaring, that Samuel Hurlburt was imprisoned on an execution for £10 18s. lawful money, in his favor; and that on the 2d of June, A. D. 1790, he made his escape through the insufficiency of the gaol. Plea — Not guilty. Issue to the court.

Judgment — That the defendants are guilty, and that the plaintiff recover £4 lawful money, the special damages only. See Staphorse v. County of New Haven, August Term, A. D. 1789.

HURD v. HULL.

A writ on which a duty has not been paid, is void.

PETITION for a new trial on account of having mispleaded. The petition was continued from last court by the agreement of the parties, and was now to have been heard on the merits; and it being now discovered that the duty has never been paid on the petition, this question was put to the court — Whether the duty might now be paid and certified and the cause proceed.

By the COURT. The statute is express and positive that no writ shall be valid, etc. unless the duty is paid and certified; and the agreement of the parties cannot alter the law.

HOLABERT v. BLAKELY.

A purchaser under a collector who sold the land for payment of taxes, may not enter till the year is expired.

A collector may not take the whole of a man's interest for a shorter term than he has in it, but must take such part as is necessary, for the whole term.

ACTION of trespass for cutting the grass, eating up the feed, etc. on a certain piece of land described in the declaration.

Plea in bar — That the plaintiff owned said land in right of his wife; that he put it into the list; that Mitchel, a collector of taxes, levied his warrant upon it, and took it for

taxes due from the plaintiff, advertised and sold it according to law to the defendant for the term of three years, and gave him a proper deed or lease of it for said term, and the plaintiff failed to pay said taxes, interest, and cost within one year, and said lease was recorded, and the defendant entered and did the facts complained of, as he had good right to do.

The plaintiff replied — That the defendant entered upon said land, and did the facts complained of within one year from the sale of said land by the collector, and the giving of said lease. Demurrer.

Judgment — That the reply is sufficient.

Two questions are made — 1st. Whether any less estate in lands than a fee, is liable to be taken for taxes? 2d. Whether if it is, the collector may take the whole, and dispose of it, for a shorter term than the debtor hath in it, and thereby deprive him of his whole living during that period — or, whether he must not take such part only, as being disposed of during the whole of the debtor's term in it, will be sufficient to pay the taxes, and leave the residue, provided the taxes are not sufficient to swallow up the whole?

The statute is — That all the real estate that anyone is seized and possessed of in his own right in fee, shall be liable, and stand chargeable with all public taxes due from the owner, etc.

The reply is no answer to the plea, because it doth not traverse the time of doing the facts, alleged in the plea.

All a man's personal estate, with certain exceptions, is liable for the payment of his taxes — and by the statute all his real estate which he is seized and possessed of in fee, is made liable to the payment of his taxes; of consequence all other estate which may partake of the nature of both real and personal is liable: Whenever it becomes necessary to take property from the debtor to satisfy his just debts, so much must be taken, as is necessary to satisfy the demand; but it ought to be taken in such a manner, as will be least prejudicial and distressing to

the debtor: To take the whole of the plaintiff's interest for three years, was not necessary, and must be very distressing to him; whereas to have taken the whole of his estate in a part, would equally have answered the demand, and left him the means of subsisting. And this is analogous to the proceedings upon an *elegit* in Great Britain, where the debt is levied and satisfied from one-half of the profits of the land, etc.

VAUGHN v. SHERWOOD.

**A garnishee has right to testify upon a *scire facias* against him, whether the plaintiff require it or not.**

SCIRE FACIAS calling upon him as agent, factor, etc. to account for the effects of Codgreave in his hands, an absent absconding debtor.

The plaintiff not needing the aid of the defendant's oath, or fearing it would be against him, did not require it, and made a question, whether the defendant might be sworn and testify in the case, unless the plaintiff required it?

By the COURT. The law considers it as a matter of account, and either party hath right to the benefit of the garnishee's testimony. The garnishee was admitted and sworn.

FILLY v. BRACE.

**If A. recommends B. to C. for a certain sum, and thereupon C. trusts B. and takes his notes payable at a certain time, and B. gives A. his note for the same sum, payable one month after B.'s note is payable to C. conditioned that, if he holds A. harmless from said debt to C. then said note to be void, if B. fails to pay said debt to C. before his note is payable to A. he will be liable upon it.**

ACTION on note, dated 25th of February A. D. 1789, for £24 lawful money, payable on the 1st of November then next, with interest; writ dated the 16th day of January A. D. 1790.

Plea in bar — That there was indorsed on the back of said note the following conditions, viz. The consideration of the within note is such, that the within named Filly did give said Brace a recommend to Elisha Cornish for fifteen or twenty

pounds lawful money; if the said Brace doth hold the said Filly harmless from that debt, then the within obligation to be void; otherwise to be in force: Averring that the plaintiff had never been damnified, but had ever been saved harmless from said recommendation.

Plaintiff replied — That at the special instance and request of the defendant he gave him the following recommendation, viz. November 20th, A. D. 1788, This may certify to you Mr. Elisha Cornish, that I will warrant Mr. Nathaniel Brace's note good for fifteen or twenty pounds. Jonathan Filly, Jr. That on the credit of said writing, said Cornish trusted the defendant and took his notes, one for £13, dated 20th November A. D. 1788, and one £8 10s., dated the 21st of said November both payable on the 1st of October then next; that the defendant had never paid said notes nor either of them; that the defendant on said 1st of October A. D. 1789, was wholly insolvent, and ever since had been totally unable to pay said notes; that on the 7th of October A. D. 1789, said Cornish put said notes in suit; recovered judgments and executions upon them against said Brace, which executions on the day of August A. D. 1790, were returned *non est;* that thereupon the plaintiff became liable to pay said debts to said Cornish, who had prosecuted him and compelled him to pay said debts; and so the plaintiff had been damnified, etc.

The defendant rejoined — Traversing the plaintiff's having been compelled to pay said debt, or his having paid it in any manner, and demurred to the residue of the reply.

Judgment — Plaintiff's reply insufficient; upon the ground, that the plaintiff's being liable for said debt is not a cause of action. Hart v. Bull, Kirby's Rep. 396; and the case of Brentnal v. Helms et al. adjudged New Haven, August Term, A. D. 1791. Further, the plaintiff's action was commenced long before the executions of Cornish against Brace were returned *non est inventus;* that it did not appear at the time when this action was commenced, but that Brace would pay said executions, and save the plaintiff harmless.

Root, J., dissented. The case of Hart v. Bull, does not compare with this case. That was upon an indemnifying bond

given by Bull after Hart had become liable upon the notes, and was sued the next day; the bond therefore could not have been given to indemnify against a mere liability, but an actual damnification upon the notes, and Bull ought to have had a reasonable time allowed before a suit was brought on the bond.

Nor does the case of Brentnal and Helms apply in this case. That was an action brought upon a promise of general indemnity, against an obligation entered into by the plaintiff, with the defendants, to the treasurer of the state, at their special request, and for their sole duty. The court determined in that case, that a mere liability to be sued, was not a good cause of action, upon a general indemnity. See New Haven, August Term, A. D. 1791.

The notes given by Brace to Cornish were due and payable on the 1st of October A. D. 1789. The recommendation was given on the 20th of November 1788. The note on which, etc. given to the plaintiff for indemnity, was dated the 25th of February A. D. 1789, payable on the 1st of November A. D. 1789; and delivered to the plaintiff with this condition indorsed upon it. The consideration of the within note is such, that the within-named Filly, did give said Brace a recommend to Elisha Cornish, for fifteen or twenty pounds lawful money; if the said Brace, does hold the said Filly harmless, from that debt, then the within obligation to be void, etc.

The true construction of these transactions and of the note in suit, appears to be this; you have recommended and warranted my notes to E. Cornish for £20, which are due on the 1st of October A. D. 1789 — in consideration thereof, I Brace give you my note payable the 1st of November A. D. 1789, with this only condition and saving; that if I pay said Cornish his debt, by the 1st of October when it is due, or before the 1st of said November and save you harmless, then this note shall be void; otherwise shall be an absolute note for the sum therein specified. Upon this construction it is clear, that as Brace had failed of paying said debt to said Cornish by the 1st of November and thereby saved said Filly harmless, he had become liable upon his note to Filly, the same as an absolute note — which places the case upon quite a different footing, from that of a general promise of indemnity.

This judgment was reversed upon a writ of error in the Supreme Court of Errors, June A. D. 1794; for the reasons following, viz.

It has been a question much discussed, whether a person having become surety for another and having taken any obligation to save him harmless on account of his having become surety, may have an action on the ground of a damnification, before he has actually paid the debt; or at any rate, before judgment is recovered against him and his body taken by the execution. There can be but little doubt concerning this question if it be taken up on the foot of reason only, without reference to any legal decisions. There certainly can be a damnification, a loss, or suffering, without paying a farthing of money towards the debt, or without being committed on the execution. It would be absurd to say that an arrest of a man's person on mesne process and obliging him to procure bail, or putting him to the necessity of attending court, on a suit brought against him for the debt, would be no damnification.

But the authorities are not silent on this subject: In Croke Eliz. page 53 is reported a case in favor of the sheriffs of the city of Norwich against Bradshaw, for an escape out of prison. The defendant after verdict against him, moved in arrest of judgment, because it was alleged in the declaration, that the plaintiffs were merely chargeable with the debt, but did not say that they were charged with it, nor showed that they were otherwise damnified. But it was determined by the court, that on a liability to be sued by the creditor, an action might be maintained by the sheriffs. It is true the court said that the defendant did wrong to the plaintiffs by the escape and therefore was liable to them, but though the court so said, they never could have adjudged the defendant to have been liable to the sheriffs for the escape merely, if the creditor had been barred of his suit against them.

In Cro. Eliz. 123 is reported a case in favor of Barkley and Gibbs, bailiffs of the city of Worcester, v. Kempstow. The declaration states that one Worsely was arrested in an action returnable before the bailiffs, chamberlain and aldermen of the city of Worcester, and that the plaintiffs were keepers of the prison in the above said city, and that the defendants owned a house adjoining to said prison, in which the bailiffs had used to commit their prisoners to be safely kept; that Worsely being arrested was by the plaintiffs committed to prison, and the defendants having said house adjoining the prison, in consideration that the plaintiffs committed the prisoner to him to keep, by which he might make his commodity, by uttering his meat and drink, and might have as great benefit as he used to have, promised to keep him safely and save the plaintiffs harmless of all escapes; whereupon they committed the prisoner to his house to keep, etc. and he such a day suffered him to escape, etc. Upon *nonassumpsit* pleaded, a verdict was found for the plaintiffs — and it was moved in arrest of judgment, that the plaintiffs did not show how they were damnified, etc. but the motion was overruled by the court, because to use their own words, "Immediately on the escape, they were damnified and in danger of being sued, and might sue the defendants presently and not tarry till they were sued."

In Cro. Eliz. 264 is reported the case of Ruth against Redgebey, which was an action of debt on an obligation to save harmless J. Robinson on an obligation; and on the plea of *nondamnificatus*, it was replied that judgment had been recovered by said Robinson against the plaintiff. The defendant rejoined, that he himself had retained an attorney in said suit, and the plaintiff was at no expenses, nor arrested on it, nor were his goods or lands seized; and that after judgment he was not damnified; a demurrer was taken to the rejoinder. All the court resolved for the plaintiff, for that by the very judgment he was damnified; and that if after the judgment he had paid the debt it would not serve, for he was damnified before.

Agreeably to this doctrine is that laid down in the case of Bothright against Harvey in Cro. Eliz. 369. In Broughton's case also, 5 Cook, 24, a quotation is made of the year-book 18 Ed. 4, 27 C. wherein it was said by Bryan and Littleton, "that terror of suit, so that one dare not go about his business is a damnification, although he be not arrested or forced by process," etc.

It was argued by the counsel for the defendant in error, that if there should be any doubt with respect to the ancient decisions, yet those of modern times have been decidedly against the plaintiff in error; but on careful examination it will be found that the ancient and modern decisions have been correspondent with each other. The modern decisions have been on the question, whether an action can be maintained against a bankrupt after an act of bankruptcy committed and a certificate obtained, by one who has been surety for him to his creditors, if such creditor on neglect of payment commence his action against the surety, before the bankruptcy, but the surety doth not settle the debt either by paying the money, or being committed to prison, till after the bankruptcy, in such case the courts in Westminster have decided that a recovery may be had against the bankrupt; because though the surety previous to the bankruptcy might have a demand sounding in damages against the bankrupt, yet he had no ascertained debt which he could swear to and prove under the commission; it did not become properly speaking a debt, before the payment of the money, or (which is esteemed equivalent to paying the money) before a commitment of the surety to prison on the execution. It is true Lord Mansfield in the case of Taylor against Mills and Magnall, Cowper, 527, speaking of Taylor at the time when Mills, etc. committed an act of bankruptcy says, "He was not damnified at that time, and till damnified (which he could not be till he had been called upon and had paid) he could not bring an action."

The case was this — Taylor was surety for the debt of Mills and Magnall, which became due before their bankruptcy; but

he did not pay it until after their bankruptcy. The question was, whether he should recover against them on account of having paid this debt, and Lord Mansfield rightly determined that he ought to recover, because he not having paid the debt till after the bankruptcy, could not come in as a creditor under the commission. But his assertion, if it be so understood, that an action never could be brought by the surety before he had paid the debt of his principal, was a mere obiter opinion, and not applicable to the cause then before him; and besides is contradictory to common sense and to other judicial determinations on the subject. It was enough in that case that Taylor could not swear to any precise debt before the bankruptcy, and therefore he ought to recover after.

The cases of Chilton against Wiffin and Cromwell, and Goddard against Venderheyden, the former reported in 3 Wilson, 13, the latter in 3 Wilson, 262, and also in 2 Black. 794, were relied on by the counsel for the defendant in error, as being in point for the defendant. But both of those causes appear to be decided on the ground heretofore alluded to, and not on that on which the present case stands. The question in those cases was, whether the plaintiffs having paid debts for the defendant, after their (the defendants) bankruptcy, should recover against them, notwithstanding they had been sued for and liable to pay the same debts before the bankruptcy; and it was determined by the court that they should recover.

In the case of Chilton against Wiffin and Cromwell, the plaintiff did not pay the money at all, but was committed to prison on the execution, and the court determined that his being committed to prison was equivalent to his paying the debt, or in other words, that the debt by such commitment was ascertained against the defendant. The court in giving their opinion in page 14, say that until the plaintiff was imprisoned, no debt was owing from the defendant to the plaintiff, and that the defendant was not indebted till the plaintiff's body was in

prison upon judgment and execution for a certain sum, and that as the plaintiff could not come in as a creditor for the amount of the judgment under the commission, he could not be barred.

In page 17, after having very fully gone into the case they conclude with the following words, "Upon the whole, no debt can be barred but what was a debt contracted with certainty before the act of bankruptcy. Did the defendants owe the plaintiff Chilton £308 10s. and cost before he rendered his body in satisfaction thereof, (which we take to be the same thing as if he had actually paid the debt and cost)? They certainly did not. They had promised to pay the money, to furnish the money to take up the bill and note and to save the plaintiff Chilton harmless; they broke their promise. Chilton was terrified and arrested. There was an injury to a certain degree, but no debt owing by the defendants to Chilton before his body was in execution for the certain sum. How could the plaintiff Chilton at the time of the commission of bankruptcy's issuing, have sworn to a debt before he had advanced a shilling for the defendant? He certainly could not. But now his body being in execution, he has thereby paid the debt; so the *postea* must be delivered to the plaintiff, and he must have judgment." It will be observed that the court say, "there had been an injury to a certain degree" before the bankruptcy. And undoubtedly for this injury an action could have been maintained and a recovery had *pro tanto*.

In the case of Goddard against Vanderheyden, the reasoning of the court is the same as in the case of Chilton v. Wiffin and Cromwell. In giving their opinion in that case it is thus laid down by them in the 3d of Wilson, 270. "If A has a bond of indemnity from B and the condition be broken, and afterwards B becomes bankrupt before A has been sued or damnified, though A has a good cause of action against B before the act of bankruptcy, yet as A had not been damnified by paying any certain sum of money, by B's breach of the condition, A cannot possibly swear to any debt due and owing

from B at the time of the act of bankruptcy. Suppose a lessee ploughs up meadow ground for which he is bound to pay the lessor a certain sum of money as a penalty, can that penalty be proved as a debt under a commission of bankrupcty? It certainly cannot."

In page 272 they make use of the following expressions, "In assault and battery before bankruptcy, during the bankruptcy the plaintiff has a verdict with damages, but had not judgment till after the certificate; the court was of opinion the plaintiff could not come in under the commission; that it was not a provable debt, or a debt due at the time of the bankruptcy, and quote Walter v. Sherlock, Hil. 23, Geo. 2.

It is very evident that in the last case put as well as in the others, there was really a cause of action existing, for which damages could be recovered before the bankruptcy, and yet when the damages were ascertained by judgment after the bankruptcy, that judgment would be considered as a good debt against the bankrupt notwithstanding his certificate. The cases in 3 Wilson, 346, of Young and Gill v. Hookley and of Paul against Jones in 1 Durn. 599, were decided on the same principle with those of Chilton against Wiffin and Cromwell, and Goddard against Vanderheyden.

Among the more ancient authorities Broughton's case in 5 Co. 24, was relied upon by the defendants in error, but no more was determined in that case than that the obligee in a bond to save harmless might voluntarily pay the debt he was bound and liable to pay and bring his action against the obligor and recover for the money so paid by him as well as if he had been compelled to the payment by a compulsory process.

Nor is the 3 Brown, 502, cited by the counsel for the defendant more in his favor. The point determined in that case was, that an obligee in a bond to save harmless, having paid part of the debt for the obligor before his bankruptcy and a part after (the bond being forfeited at the time of the first payment) might come in as a creditor under the commission for

the whole debt; an inference certainly could not be drawn from his coming in as a creditor for what he paid before his bankruptcy, that he had no cause of action, for such sum paid, at the time of payment. For suppose no sum had been paid by him but what was paid before the bankruptcy and the remained of the debt had been paid by another person after the bankruptcy; or suppose the remainder had never been paid? Would not an action have been sustained immediately on the payment of this sum? Would not his being obliged to pay it be a damnification? There can be no question about it. There is not even a *dictum* but that on the payment of money an action will lie to recover so much as is in fact paid.

It is therefore clear from adjudged cases that an action may be maintained on an obligation covenant or engagement to save harmless, if a suit be previously brought against the obligee, etc. by the creditor, whose debt he became surety to pay; or even if there is an attempt or threatening to bring a suit so as to affrighten and terrify him. Whether, if the money be not paid to the creditor by the time stipulated, and whether, if such obligee or covenantee be barely liable to pay the debt an action may be maintained by him against the obligor, is still the question? To this the 3 Bulstrode, 233, is directly in point, in which the sole question was whether an action would lie on a mere liability to pay, and it was determined that it would.

So in Salk. 197, it was said by the court, "That where the counterbond or covenant is given to save harmless from a penal bond before the condition is broken, then if the penal sum be not paid at the day, and so the condition not preserved; the party to be saved harmless does by this become liable to the penalty, and so is damnified, and the counterbond forfeited." Though in the same case the court held, where the action was brought by the covenantee, on a covenant of quiet enjoyment of lands assigned by a lessee to him and that he should be clearly discharged, or otherwise indemnified from all arrears of rent due from the lessee, "that rent remaining in arrear and

not paid, is not a damage unless the plaintiff be sued or charged; and if paid any time before such damage incurred by the plaintiff it is sufficient," not to mention that in Cro. Eliz. 53, which has been before cited the court expressly say, that on a liability to be sued the sheriff may maintain an action.

We think therefore that a liability to be sued or to pay; a liability every moment to be arrested or to have property taken, necessarily carries with it a damnification to the person thus liable to be sued; if the principal debtor, for whom such person was bound be reduced in his circumstances or insolvent, and in such case no express damages need be proved.

It was said by the defendant in error, that the recommendation given by the sheriff in error, was that the defendant was good for fifteen or twenty pounds; but that the credit given him was for £21 10s., and that therefore the plaintiff in error was not holden by the recommendation; to this may be answered, that the largest note being given on a day previous to that on which the other was given, the plaintiff in error would be liable on the recommendation for the £9 at least; but at any rate the defendant in error shall never say that the plaintiff in error was not liable on the recommendation when he concedes, that by means of it, he obtained the credit; and that some months after the recommendation and credit was given he gave the note of indemnity to secure the plaintiff in error against all damages he might be liable to in consequence of this very recommendation.

Upon the whole we are of opinion, that as the plaintiff in error was liable to pay the debt to Cornish and to be arrested and to have his property taken therefor; and as the defendant in error was reduced in his circumstances and insolvent, at the time when the suit was commenced on the note of indemnity, there were sufficient ground of damnification to entitle the plaintiff in error to his action and consequently the judgment of the Superior Court ought to be reversed.

NELSON v. HAMMOND.

On an objection to an appeal in an action on book, because the debt did not amount to £20 — the book ought to be inserted in the objection, that it may appear from the record.

ERROR to reverse a judgment of the County Court, denying an appeal in an action of debt by book, for a sum more than £20, and demanding in damages £30, brought by Nelson v. Hammond.

The defendant plead in abatement — Diminution of the record. This was objected to as improper; if the writ of error hath not set forth the record truly, the defendant may plead *nul tiel record*, or take advantage of the variance in abatement; but if the County Court hath not given out the whole record, the plaintiff may allege diminution, and pray a *certiorari* to the judge or the court in which the record is, to certify the whole record.

The defendant took back his plea and plead — That there was no such record and judgment, etc. Upon inspection the court found that there was such a record, etc. The defendant offered a copy of a book which was for less than £20 certified by the clerk to be a true copy of the plaintiff's book, lodged on file.

By the COURT. If the defendant would have advantage of this, he ought to have inserted the book in his objection to the appeal, and so placed it on the records of the County Court.

The defendant then plead — Nothing erroneous in the record and judgment, etc.

Judgment — Manifest error; for from the record it appears that the cause was appealable.

HUBBEL, EXECUTOR OF HENDRICK WINEGAR, v. PRAT.

An executor has no right to petition relative to lands, unless wanted to pay debts, or is particularly authorized by the will.

PETITION in chancery; showing, that said Prat was a collector of taxes for the town of Kent; that he had a tax against said Winegar, for £22; that he levied upon a tract of land, described in the petition, worth £240 lawful money, and sold

it on the 20th of March, A. D. 1787, to Botsford for said taxes and cost, that Botsford had reconveyed said land to said Prat; that said Winegar died in July, 1787, having appointed the petitioner his executor; that the estate was insolvent; that said Prat exhibited said taxes to the commissioners as a claim against said estate, and had them allowed; that the petitioner was ignorant of said sale and deed, until after a year had elapsed from the sale; that the heirs of said Winegar were minors; that said Winegar refused to receive said taxes, interest and cost, and to release said lands; praying that he might be compelled to do it.

Upon the evidence it appeared — That the land was worth much more than it was sold for; that said Winegar's estate was not insolvent; that the executor had discretionary power given him by the will, to sell lands, if necessary for certain purposes; that said Winegar had personal estate to pay said taxes, and other lands which were clear.

After hearing the case upon the merits, the court dismissed the petition; because the executor did not show that he had right to bring this petition as it was not wanted to pay the debts, nor to answer the purposes of the will. The right therefore if any existed, was in the heirs of said Winegar, and not in the executor.

## Day v. Leavensworth.

**Public securities payable on demand — estimated at the time of the contract.**

Action on bond for £1,000; conditioned to pay £859 in loan-office certificates of the United States, payable on demand, dated the 10th of March, A. D. 1790. Special demand made on the 25th of May, A. D. 1791.

Case was defaulted — And upon a hearing in damages, the court assessed the damages according to the value of the securities at the date of the bond, they being immediately due and payable at the option of the creditor, and not at the time of the demand. See Babbet v. Balding, and Curtice v. Whipo, Fairfield August Term, A. D. 1792.

HURLBURT v. MARSH AND THE TOWN OF LITCHFIELD.

**Towns not liable for the default of their constables, in the execution of their office.**

ACTION of the case; declaring, that the town of Litchfield in December A. D. 1789, chose and appointed Andrew Adams, Jr. a constable for A. D. 1790, who was duly sworn; that in January A. D. 1790, he delivered to said Constable Adams an attachment in his favor against Zebulon Taylor, of said Litchfield, for £ lawful money, and returnable to the County Court in Litchfield, holden on the fourth Tuesday of March, A. D. 1790, that said Constable Adams returned said writ indorsed under his hand and office, that for want of estate he attached the body of said Taylor, read said writ in his hearing, and had taken sufficient bonds for his appearing at court; and that before the County Court at Litchfield, holden on the fourth Tuesday of March, A. D. 1791, he recovered judgment by the default of said Taylor's appearing, for the sum of £13 13s. 6d. lawful money, damages and cost, upon which judgment he took out execution and delivered it to a proper officer, who returned said execution indorsed, *non est inventus*, that said Taylor had become bankrupt and avoided said execution: Further alleging, that the return of said Constable Adams on said attachment was false and undue, for that he did not take any bonds to secure the appearing of said Taylor, to answer to said action, whereby he had become liable for said debt, and that said Constable Adams was bankrupt, worth nothing, and was so before, and at the time when said town of Litchfield chose him constable, and well known to the said town to be so; whereby the plaintiff had wholly lost his said debt; of all which the defendants had been duly notified, and requested to pay; and thereupon the defendants became liable to pay, and in consideration thereof assumed and promised, etc. The defendants demurred to the declaration.

Judgment — Declaration insufficient.

Towns are not liable or responsible for the conduct of the constables whom they appoint, in the execution of their office,

except to the state in the case of tax gathering, any more than the governor and council are responsible for the sheriffs they appoint. The law makes it the duty of towns, annually to appoint constables, and to see that they are sworn before the 1st of January; it prescribes and enjoins upon constables the duties of their office; they do not act under the authority of the town, but of the law, nor hath the town any control over them, or power to require security from them.

SAMPSON v. HUNT.

**Issues put to the court are to be answered explicitly.**
**And a decree in chancery must find the facts which warrant the decree.**

ERROR to reverse a decree of the County Court upon a petition in chancery, brought by Hunt v. Sampson; showing, that in March, A. D. 1786, he bought a right of land of said Sampson, lying in Waybridge, in the state of Vermont, laid out in the right of D. Chapman, at the price of £30 lawful money; that he paid £4 in cash, and gave his note for £26; that said Sampson at the time of said bargain and sale of said right, to induce the petitioner to buy the same, declared and affirmed that he had a good title to said right, upon which the petitioner relied and bought said right, accepted a deed of it, and paid and secured the purchase money as aforesaid; that the affirmation of said Sampson aforesaid, was false; that he had no good title to said right, which said Sampson well knew, whereby the petitioner was deceived and defrauded; that said Sampson had become bankrupt, and removed out of the state; that judgment and execution had been recovered on said note, the execution levied on estate and a receipt taken and put in suit: Praying that said note might be decreed to be void, or delivered up; and all proceedings thereon set aside.

Plea in abatement — That the property of said note was in Wheeler to whom it had been sold and assigned for a valuable consideration, who was pursuing his remedy at law to recover

the money due on said note; and that he had not been cited or notified of this petition. 2d. That the petition did not contain sufficient grounds for relief in chancery; that Hunt sued Sampson on his covenants in said deed, in September A. D. 1788; that the parties came together and settled said action, and said Sampson gave his note to said Hunt for a large sum; that Benton in A. D. 1787, offered said Hunt to take his bargain and risk, for $2; which he refused.

Judgment of the County Court on this plea was — That the respondent had not proved the facts alleged in said plea; and that such parts of said plea as did not depend on proof, were insufficient in the law; and upon a hearing on the merits, the County Court found that all the material facts alleged in said petition were true; and decreed that a perpetual injunction be laid upon all proceedings on said note, the judgment, execution, and the action upon the receipt taken by the officer.

Errors assigned — 1st. That said court mistook the law, in their judgment on the pleas in abatement. 2d. Said court mistook the law in their decree on the merits, both in point of substance and form; that it affected the parties to the suit on the receipt, who were not before the court, and deprived the plaintiff in that suit of his legal right to recover, what he was accountable for at all events, either to the creditor or the debtor for the goods taken on the execution.

Judgment — Manifest error, in the whole of the proceedings complained of, and affirmed in the Supreme Court of Errors in June, A. D. 1794.

### Talmadge et al. v. Northrop.

**If a juryman gives evidence out of court to his fellows, which was not given in court it will vitiate the verdict.**

Action of the case; declaring, that in A. D. 1789, they sold a number of horses to one Luman Bishop, on credit, to the amount of about £51, for which he took said Luman's note; that judgment and execution had been recovered on said note; that before said judgment was recovered said Luman was bankrupt, and had absconded out of this state, and said exe-

cution was duly returned *non est inventus;* that the defendant at the time of the sale of said horses to said Luman, was in partnership with him in the purchase of horses, and received the plaintiffs' said horses, shipped them to the West Indies and received the avails, and had secretly contrived with said Luman, knowing him to be a bankrupt, to purchase the plaintiffs' horses on his own credit, for the joint benefit of both, etc. Damage £100.

Plea — Not guilty. Issue to the jury. Verdict for the defendant.

Motion in arrest of judgment — That a Mr. Patterson, one of the jury, gave evidence to his fellows, while they had the cause under consideration, which was not given in court, viz. That he was coming through Warren, the place where the horses were sold, when Colonel Talmadge and his brother were selling them to Luman Bishop; and he wondered that Colonel Talmadge trusted him, as he lived within six miles of him, and must have known his circumstances; for that said Patterson, would not trust said Bishop himself: Further alleging, in the motion, that the representation of the juryman was not true, for that Colonel Talmadge, was not at Warren, when the horses were sold by his brother; and knew nothing of it until sometime after.

The court inquired of the jury and found the facts alleged in the motion to be true; and the verdict was set aside, and the cause continued for another trial.

### Tyler v. Scovel.

**Plaintiff admitted to testify in an action of trespass, where his depositions were ruled out.**

Action of trespass for cutting of trees, etc. on the statute. Plea — Not guilty. Issue to the jury.

Certain depositions were objected to and excluded, because they were taken more than two hours after the time set in the notification, and the defendant gone, who had been waiting near two hours at the place of caption, and neither the plaintiff nor any of the witnesses appeared whilst he stayed.

The plaintiff thus deprived of his evidence, moved that he might be admitted a witness to prove the trespass, according to statute. By the court he was admitted.

ADAMS and ROOT, JJ., dissented. The admission of a party in interest to testify, is allowable upon the ground of necessity only to prevent a failure of justice. The statute admits the plaintiff to his oath in cases of trespass done privately, where he is not able to produce any other evidence thereof than to render it highly probable — but never intended to let in the parties to testify, where there was other proof within the knowledge and power of the plaintiff, and he neglected to produce them, or was deprived of the benefit of them by his own fault.

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**HARTFORD COUNTY, FEBRUARY TERM, A. D. 1793.**

TREASURER COLT v. EATON & GOODWIN.

The court will chancer a bond upon a *scire facias*.

SCIRE FACIAS on a bond of recognizance, for £200; conditioned, that said Eaton should appear before the Superior Court and answer to a certain information against him for passing counterfeit money; which had been called and forfeited.

The case was defaulted — And upon motion of the bondsman, the court heard the situation and circumstances of the case, and chancered said bond down to £100 lawful money.

REBECCA BELDEN, EXECUTRIX OF JOHN BELDEN, DECEASED, v. ROBBINS.

Where in an action on book, a balance is found for the defendant, and the plaintiff appeals, and after entering, withdraws his action, the defendant may enter and have the judgment of the County Court affirmed.

ACTION of debt on book, for a debt claimed to be due to the deceased.

The defendant plead in the County Court — That he owed the deceased nothing, but that the deceased was in arrear to him.

Verdict — That the defendant owed the deceased nothing, but that the deceased was indebted to the defendant £5 16s. 5d. lawful money.

The plaintiff appealed the cause to the Superior Court, and entered her appeal, and then immediately withdrew the action.

The defendant moved for liberty to enter said action in the Superior Court, and to have the judgment of the County Court affirmed against the plaintiff, said withdrawal notwithstanding; which was allowed and judgment rendered accordingly.

### Strong v. Meacham.

Action on a note, dated the 22d October 1790, for £20, payable in brandy, ironware, etc. in a reasonable time. Damage demanded was £30.

The case was appealed by the defendant, and a demurrer closed upon long special pleadings, which being read, a question was made by some of the judges, whether the cause was appealable; the note being for £20 only, which was the only matter in dispute.

The plaintiff moved for liberty to plead in abatement of the appeal; but not allowed, the rules for pleading in abatement being out. The court dismissed the appeal *ex-officio*, but allowed no cost.

### Chapman v. Griffin.

Action upon the covenants in a deed; declaring, that the defendant by deed dated the 8th of December A. D. 1789, bargained and sold to him forty acres of land, particularly bounded and described in said deed, and covenanted that he was well seized of said forty acres, etc. when in fact, at the date and execution of said deed, he was not seized of more than thirty-five acres within said bounds, etc. To his damage £10.

On motion the cause was dismissed from the docket as not being appealable; the damages being the only matter in dis-

pute, no question could arise about the title to said land, only an inquiry whether there were forty acres or thirty-five, within the bounds described in the deed.

PATTEN v. THOMPSON.

ACTION upon a note, dated the 4th of May A. D. 1790, for £400, payable in final settlement notes, within one year from the date with the lawful interest in silver or gold.

Plea in bar — That there is secured in and by said note by the corrupt agreement of the plaintiff and defendant more than lawful interest at the rate of 6 per cent. per annum, viz. £6 lawful silver money for every £100 in final settlement notes.

The plaintiff traversed the plea in bar, and the parties were at issue thereon to the jury. The note was all the evidence relied upon by the defendant to prove the usury.

The jury found a verdict for the plaintiff and £350 damages — which was accepted by the court.

GRANT v. SHAW & RUSSEL.

ACTION of trover for twelve tons of hay. The defendants plead severally not guilty. Issue to the jury.

The case was — Shaw recovered a judgment and execution against the plaintiff for £3 14s. debt and sixteen shillings cost, and delivered the execution to said Russel, who was an officer, and who returned said execution with his indorsement upon it, that he had sold five tons of hay by a sample for £1 18s. as the law directs — in which no mention was made of any demand, levy, nor of advertising or posting of said hay.

Verdict for the plaintiff and £4 damages.

The officer offered to prove by parol testimony, that he had made demand on the execution, and had posted the hay; but not allowed, because he is to be justified by his return in an action brought against him, unless it is falsified; but in an

action brought against the purchaser under him the case would be otherwise, for he has no power over the officer's return, and may prove by other evidence that the estate was legally sold.

PETTIBONE v. ADMINISTRATORS OF LEMUEL ROBERTS.

A decree of foreclosure in favor of the assignee of the mortgagee, where the estate doth not exceed the debt, cost, and repairs.

PETITION in chancery for the foreclosure of the equity of redemption in a mortgaged estate — showing that on the 12th of September A. D. 1789 said Lemuel mortgaged a farm of 101 acres to James Roberts and Amos Gillet for £324 13s. lawful money and the interest, payable in eighteen months; that on the 12th of August A. D. 1790, said James and Amos assigned said mortgage to the petitioner; that thirty-seven acres of said farm was mortgaged to one Price of Boston, previous to the deed to said James and Amos, for £100, of which they had no knowledge; that the petitioner's debt against said Lemuel was £57; that said Lemuel's estate was insolvent, and that the petitioner had been put to expense in defending the title to said farm in the Circuit Court.

Upon a hearing on the merits, the court found that the value of the estate did not exceed the debt due on the mortgage to James and Amos, the mortgage to Price, and the petitioner's own debt and the cost incurred in the Circuit Court and necessary repairs; and thereupon decreed a foreclosure on the administrator's failing to pay the aforesaid sum and the cost of this petition.

CONE v. BULL.

In an action for an assault and battery, and for rescuing a prisoner, on issue to the jury the plaintiff was permitted to prove that he was an officer, and had a lawful writ of execution although not alleged in the declaration.

ACTION of trespass for an assault and battery, also for rescuing one Dudley whom the plaintiff had a prisoner upon an execution.

After the institution of this action, the judgment on which said execution issued was reversed, and the defendant plead *nul tiel record*, as to that part of the declaration which was found for him; and as to the assault and battery he plead not guilty — issue to the jury — and in this part of his declaration he had not alleged that he was an officer in the execution of his office.

Question — Whether the plaintiff might give evidence that he was a constable and held said Dudley a prisoner on said execution.

The court admitted the evidence to obviate the defendant's justification, and to show the right he had to oppose force to force in order to retain his prisoner.

ENO v. BROWN.

In an action of assault and battery the plaintiff may give in evidence, what the defendant had confessed in a criminal prosecution against him, for the same assault, etc.

ACTION for an assault and battery. Plea — Not guilty. Issue to the jury.

The plaintiff was allowed to give in evidence what the defendant had confessed in a trial upon a criminal prosecution against him, at the suit of the public, for the same transaction.

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**TOLLAND COUNTY, FEBRUARY TERM, A. D. 1793.**

SNOW v. CHAPMAN.

If a deed grants all the lands within certain bounds, and calls it more than it is — the covenants extend only to the land within the bounds.

ACTION upon the covenants of seisin, declaring that the defendant for the consideration of £180 bargained and sold to the plaintiff, a piece of land, containing 110 acres, butted and bounded as follows, viz. [describes particularly the lines and bounds] as appeared by said deed dated the 30th of April A. D. 1790, and in and by said deed did covenant that he was

well seized of said bargained and granted premises, as a good indefeasible estate, in fee-simple, etc. and that at the execution of said deed the defendant was well seized of ninety acres of said land only; and of twenty acres thereof he was not well seized, nor had any right to sell the same. Damage £40.

Plea — That the defendant had kept and performed his covenants in said deed. Issue to the court.

It appeared that the defendant had a good title to all the lands within the bounds and lines described in said deed — but that in fact there was but ninety acres contained within said lines and bounds.

The question was — What were the granted premises; for of them the defendant covenanted that he was well seized; were they 110 acres of land, or only all the land contained within the bounds described?

The court were of opinion that the deed granted nothing but the lands lying within the bounds described, and gave judgment for the defendant, that he had kept and performed his covenants.

## Rockwell and the Inhabitants of East Windsor v. Foster.

**A soldier that enlists by the procurement of two men, in exoneration of themselves, is entitled to all the public premiums.**

Error to reverse a judgment of the County Court, in an action brought by said Foster against said town of East Windsor, declaring that in December A. D. 1776, the general assembly granted a bounty of £10 in addition to the premium given by Congress, to every able-bodied effective man, who should enlist into the continental army for three years or during the war; that said town of East Windsor, as an additional encouragement to induce men to enlist as aforesaid, on the 7th of April A. D. 1777, in legal town meeting, voted that each soldier, being an inhabitant of said town, who had or should enlist into the continental service, as proposed by the general assembly, should be paid by the selectmen of East Windsor, the sum of £10 in money, to be collected by a rate on the list of A. D. 1776; that the plaintiff being an inhabitant

of the town of East Windsor, did on the 6th of May A. D. 1777, enlist into one of this state's regiments, in the continental army, for three years, according to the proposals of the general assembly, being induced thereto by the vote of said town, and thereby became entitled to receive said £10 from said selectmen, and said sued town became liable to pay the same in a reasonable time, agreeable to said vote; yet the defendants had never paid said £10 although a reasonable time had elapsed and the money been often requested, particularly on the 10th of July 1777. Damage £20.

The defendants plead in bar — That the general assembly in May A. D. 1777 passed a law that any two men belonging to this state, and not of the continental army who should procure an able-bodied soldier or recruit to enlist into either of the battalions, to be raised in this state for three years or during the war, should be exempted from actual service in the army, and from all drafts and detachments during the term the soldier they had procured should enlist for; and that after passing said act, viz. on the 26th of May A. D. 1777, Rufus Cleaveland of said East Windsor was drafted for a tour of duty in the army; that he and Edward Payne of said town, procured and hired the plaintiff to enlist into one of the battalions, raised by this state for the continental army for the term of three years, and gave him £30 lawful money to enlist, whereby said Cleaveland and Payne were exempted from all military service and duty during said term; and that the plaintiff did not enlist pursuant to the vote of said town, but by the procurement and hiring of said Cleaveland and Payne.

To this plea in bar the plaintiff demurred. Judgment of the County Court — That the plea in bar was insufficient.

Errors assigned — 1st. That judgment ought to have been, that the plea in bar was sufficient and for the defendants to have recovered their cost. 2d. That the plaintiff's declaration was insufficient. Plea — Nothing erroneous.

By the COURT. There is nothing erroneous in the judgment complained of. The continental, state and town bounties were accumulative encouragements to enlist; and every soldier that enlisted was entitled to them all, notwithstanding he was hired by one or two men thus to enlist; for the act of assembly passed in May A. D. 1777, exempting any two men that should hire one to enlist into the army, doth not take away any of the premiums offered by the public, but allowed him to take the whole, as an inducement to engage for a less sum from those who hired him.

The declaration alleges, that on the 6th of May, the plaintiff being an inhabitant of East Windsor, did enlist a soldier in one of this state's regiments in the continental army, for three years, agreeable to the proposals of the general assembly, being induced thereto by the vote of said town.

The defendants in their plea admit the vote of the town; they state the act of assembly passed in May A. D. 1777, excusing two men that should hire one; they say that on the 26th of said May the plaintiff was hired by two men to enlist, and that in fact he enlisted into one of the battalions raised by this state in the continental army, for three years; whereby said two men were exempted during that term, and thereupon the defendants say the plaintiff did not enlist pursuant to the vote of said town, but by the procurement of said two men.

The defendants have admitted everything in their plea which is necessary to entitle the plaintiff to a recovery, provided a soldier, who enlisted by the hiring or procurement of two men, is entitled to the premium — for although they say he was hired and enlisted on the 27th of May, yet as they have not traversed his enlisting on the 6th of May, which is directly averred, it is admitted.

The only question then before the court is — Whether a soldier, hired by two men to enlist, etc. is entitled to the public bounties.

The court are of opinion that he is; for 1st. He is counted for one of the town's quota. 2d. He goes to fill one of the regiments exacted from the state. 3d. He is induced thereby to accept so much less from the two men, who hired him. 4th. The two men who hired him are deducted from the list of effective men in that town, on which future levies are to be made. Thus it is in all respects just and works no injury to any.

The Chief Judge dissented from the court in the judgment.

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**SUPREME COURT OF ERRORS, A. D. 1793.**

ROCKWELL AND TOWN OF EAST WINDSOR v. FOSTER.

ERROR from the judgment of the Superior Court affirming a judgment of the County Court in the county of Tolland, in an action by said Foster against said town of East Windsor, for an additional bounty granted by said town to soldiers who enlisted into the continental army.

Judgment of the Superior Court reversed.

By the COURT. The vote of the town of East Windsor, as recited at large in the declaration, and on which this action is brought, appears by the declaration to be made and passed with reference to a resolution of the general assembly of this state, held at Middletown in December A. D. 1776, and on the same proposals and conditions contained in said resolve of assembly, which is also recited at large in the declaration, in and by which it is resolved, that all able-bodied noncommissioned officers and soldiers, who then had or should speedily enlist into either of the battalions ordered by the assembly of this state to be raised in this state, for the term of the then present war, or for the term of three years from their enlistment, unless sooner discharged, should be entitled to have and receive the additional premium of £10 in addition to the

premium, wages and encouragement offered and given by the continental Congress.

The declaration then goes on and states, that on or about the 6th of May A. D. 1777, the said Foster, being an inhabitant of East Windsor, did enlist into Capt. Blackman's company, in Col. Henry Sherburn's regiment, according to the proposals of the general assembly of this state, but doth not allege that he enlisted according to the proposals contained in the same resolve of assembly, referred to in said vote of the town of East Windsor.

Nor is it alleged or averred in the declaration, that Col. Henry Sherburn's regiment was one of the regiments or battalions ordered by the assembly of this state to be raised in this state, which is an essential part of the proposals in said resolve of assembly, to entitle a soldier to receive the additional bounty of £10 from the state, or the bounty from the town of East Windsor, which was offered on the same proposals and conditions contained in said resolve of assembly, and extends to none but such men as enlisted into the battalions ordered by the assembly of this state to be raised in the state.

The declaration therefore states no sufficient grounds to entitle said Foster to receive the bounty demanded, and is therefore ill and insufficient on demurrer.

The plea of the defendants in said original action, viz. That said Foster was procured and hired by Cleaveland and Payne to enlist into one of the continental battalions, then to be raised in this state according to another act of assembly of this state, is a sufficient answer to said declaration and ought on demurrer to have been so adjudged by said Court of Common Pleas and by the Superior Court.

KINGSBURY v. SELECTMEN OF TOLLAND; IN WHICH TOWN IS BUT ONE ECCLESIASTICAL SOCIETY.

**A society have right to tax the inhabitants for building a steeple to their meeting-house by a major vote.**

ACTION for taxing him illegally towards building a steeple to the meeting-house, whereby his ox was distrained, etc. Plea — Not guilty. Issue to the jury.

The facts were agreed, and the grounds upon which the plaintiff claimed to recover, were in the first place — That the building of a steeple to a meeting-house was not a matter for which a society, by law, had right to tax its inhabitants. 2d. If it had, the law required it should be by two-thirds of the voters; and that the vote in this case was by a majority only.

Verdict for the defendants.

By the COURT. The building of a steeple to the meeting-house is a matter for which an ecclesiastical society hath right to tax its inhabitants by a major vote; and the law does not require two-thirds of the voters to give it validity.

### STATE v. BLODGET.

**On an information for a forgery, the person in whose name it is charged to be done, cannot be a witness.**

**Ordinarily, the writing is to be produced before the evidence is taken to the forgery.**

INFORMATION for forging a discharge. The defendant plead not guilty. Issue to the jury.

Smith, in whose name said discharge was given, was offered a witness, but not admitted. See State v. Brownson, Litchfield, August Term, A. D. 1791.

By the COURT. In ordinary cases the writing charged to be a forgery, must be produced in court, before any evidence can be admitted concerning the facts. The attorney for the state not being able to produce the writing entered a *nol. pros.* See State v. Osborn, New Haven, January Term, A. D. 1790.

### COBB ET AL. v. BALDWIN.

**On an action of account by the assignees of certain debts, against the attorney who received them to collect — the assignor, if solvent, may be a witness for the defendant.**

ACTION of account for a number of book-debts, notes and securities to the amount of £318 7s. 10d. lawful money, belonging to the iron furnace company in Stamford, against a great variety of persons, taken to Elijah and Archibald Austin while

they were agents for said company, and delivered to the defendant to collect and to pay to the plaintiffs, two-fifths of the avails, pursuant to an award of arbitrators.

Plea in bar — The defendant admitted receiving the securities, etc. to collect and pay over as alleged in the declaration — but said that he sued several of the persons mentioned as debtors, in the name of said Elijah Austin, the said Archibald being dead, all of whom produced discharges or accounts, that overbalanced the debts, of which he informed said Elijah and said Elijah ordered him to desist and not sue any more of said debtors, which the defendant accordingly did and had never recovered or received any thing upon said debts and securities.

Plaintiff traversed the plea in bar. Issue to the court.

The defendant produced the deposition of said Elijah Austin who testified to the facts alleged in the plea.

The court found the plea in bar to be true, and gave judgment for the defendant to recover his cost.

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**WINDHAM COUNTY, MARCH TERM, A. D. 1793.**

PERKINS v. DOW.

**A man has right to the use of water running through his land for necessary and for beneficial purposes, but so as not to deprive the proprietor below of the surplus.**

ACTION for a nuisance; declaring, that for time immemorial a certain stream of water had run through the defendant's land and in its natural course, to and through the plaintiff's land, which he had constantly used for watering his cattle, flowing his land, and carrying his grist-mill, which was anciently erected upon said stream; that on the day of August, 1790, the defendant by digging a ditch on his own land, had turned and diverted said water out of its natural course, so that it was prevented coming to the plaintiff's land; whereby he was deprived of it for the purposes above expressed, etc. Damage £500.

Plea — Not guilty. Issue to the jury.

Question — Whether the plaintiff might give evidence of any diverting of said water, for the purpose of enhancing the damages previous to July, A. D. 1790, when said obstructions were removed by the plaintiff.

By the COURT. He may; for as the defendant replaced the same obstructions immediately after, it is to be considered as a continuation of the same nuisances.

One Hun, who tended the plaintiff's mill during this period upon shares, was produced as a witness, and objected against by the defendant on the score of interest; and by the court was not admitted — upon which Hun made and executed a full discharge to the plaintiff, which he received and accepted — also he made a full discharge to the defendant, which he offered to the defendant but he refused to receive it; but upon said Hun's tendering said discharge to the defendant, and lodging it in the custody of the clerk for his benefit, the court admitted him. Doug. 134.

Upon the evidence, the case appeared to be thus — The defendant owned a valuable meadow through which said stream of water run; which stream ran east and west, and was easily turned out of its natural course on the defendant's land; the defendant by placing dams in the natural channel, and cutting small ditches northward and southward upon his own land, threw the water upon his meadow, northward and southward; the water which was turned out northward, was not absorbed, returned into the natural bed of the stream, before it got to the plaintiff's land; was turned out southward, which was by far the greater part, did not any part of it return into its natural course again before it came to the plaintiff's land, but went off southward into the low lands.

The jury brought in a verdict for the defendant; the court dissented from the verdict, and delivered their opinion upon the law in the case.

The defendant had right to use so much of said water, passing through his land, as to answer all necessary purposes, to

supply his kitchen, and for watering his cattle, etc. also he had right to use it for beneficial purposes, such as watering and enriching his land; but this right hath restrictions, and must be so exercised as not to injure the plaintiff, who lies next below, and who hath right to have the surplus flow into his land in the natural channel; and which appeared might easily have been done in this case; the defendant, therefore in diverting the surplus of the water, not used by him, out of its natural course and away from the plaintiff's land was an injury and a nuisance. Upon which the jury found a verdict for the plaintiff, and £15 damages.

The principles of law advanced in this case were recognized by the Superior Court at Windham March Term, A. D. 1783, in the case of Howard v. Mason.

The plaintiff declared — That for more than seventy years, he and those under whom he claimed had enjoyed and used a certain stream of water, for the purpose of carrying his grist-mill; which stream was formed by the confluence of a number of smaller streams; one of which run in its natural course through the defendant's land; and that the defendant by cutting a new ditch had turned the greater part of said smaller stream, from its natural course, and spread it upon his own land near a mile above the plaintiff's mill, whereby most of it, was absorbed before it came to his mill, and that he was greatly prejudiced thereby, etc. Plea — Not guilty; and verdict for the plaintiff.

The defendant moved in arrest of judgment — That the plaintiff's declaration was insufficient.

The question was — Whether the defendant had right to diminish the quantity of water, by spreading it upon his land to manure and enrich it, and make profit. The court determined that he had; provided he did it prudently, and did not deprive the plaintiff of the surplus — and judgment was arrested accordingly.

CALEB HOWARD AND THE REST OF THE INHABITANTS OF THE FIRST ECCLESIASTICAL SOCIETY IN POMFRET v. WALDO.

The court will not, on a motion, decide a question relating to the power of agency which involves in it the merits of the cause to be tried.

Where a number of persons dissent from the same church, etc. and form themselves into a church or society separate from the other church and society— there is no need of their lodging any certificate, etc. and they thereupon become disabled to vote in said first society, except in matters pertaining to schools and schooling.

ACTION of trover for the society's book of records conversion laid, in February A. D. 1793.

The defendant challenged the power of the agent who appeared, to prosecute in behalf of the plaintiffs; because he was not regularly appointed.

The facts were — That on the 1st day of December, A. D. 1792, a new voluntary society was confederated and formed, consisting of the members of said first society; by the name of the Catholic Reformed Christian Church and Congregation; and contained the greater part of the legal voters, which belonged to said first society; which confederation and agreement was kept concealed. On the 19th of December the annual society meeting was held in said first society, and all the legal voters in the old and new formed society, were present and voted in the choice of a committee, and of the defendant to be clerk. On the 29th of the same December the Reformed Catholic Church, etc. met pursuant to a regular warning, chose a moderator, clerk and committee; and voted to give Mr. Dodge a call to settle amongst them in the work of the gospel ministry, and on the 6th of January A. D. 1793, he was ordained. On the 8th of February A. D. 1793, the first society, pursuant to a warning given, to all the legal voters in said society, exclusive of the members of said new Catholic society, for that purpose met, and in legal meeting, voted that Samuel Waldo, and two of said committeemen chosen on the 19th of December aforesaid, had gone off from them and joined said Catholic Reformed Society, etc. whereby their offices had become vacant — and then pro-

ceeded and chose a clerk, and two committeemen in their room, and appointed Capt. Seth Grosvenor an agent to commence and prosecute this suit for said book of records, by twelve voters; being all that were left in said first society. Against which appointment, thirty-seven voters belonging to said Catholic Reformed Society, voted and protested.

The question upon this state of facts was — Whether the agent was legally appointed. The court were unwilling in this summary way to give a peremptory answer to a question, which entered so deeply into the merits of the cause. As the agent had got a formal appointment of record by the first society in Pomfret, he had right to appear and prosecute; whether that body, the twelve voters who appointed him, were the first society in Pomfret or not, was the question to be decided upon the merits. The defendant plead not guilty. Issue to the jury.

In the cause upon the merits the written covenant and confederation of the Catholic Reformed Church and Society was produced and read: In that they expressly declare, " that they do covenant and confederate together agreeable to the law, entitled an act securing equal rights and privileges to Christians of every denomination in this state," which agreement was subscribed by them individually. None of them had lodged any certificate with the clerk of said first society — and claimed a right still to vote in the first society, in all matters equally as before said association.

The jury found a verdict for the defendant, from which the court dissented, and delivered to the jury their opinion upon the law — as follows:

The design of this statute is to secure to every denomination of Christians equal rights and privileges, and to give to all liberty to worship God, according to their consciences, and to prevent every kind of intoleration and oppression either towards the dissenters, or those dissented from.

The law goes upon the idea, that public social worship of the Deity, is a part of natural, as well as revealed religion; indispensably obligatory upon every individual, and essential to the well being, peace and happiness of society.

The first paragraph provides how an individual, who conscientionsly dissents from the church or society to which he

belongs, may regularly separate from it, and join to another church and society of a different denomination, by lodging a certificate of his dissent, and choice of the church or society to which he is joined.

The second paragraph is conversant about dissenting churches and congregations, which were already formed; or which may hereafter be formed, for the purpose of public social worship among themselves; granting to them certain powers and privileges, as of building meeting-houses, settling and maintaining ministers, etc. etc. And every person who claims the benefit of either paragraph of this act, is disqualified to vote in any meeting of such first society, except in matters which relate to schools.

The Catholic Reformed Church, etc. associated themselves into a church state; they went off in a body; the instrument containing the articles of their union is evidence of their having separated, and having become a church by themselves; and they expressly claim the benefit of this law in their very act of incorporation; and for them after this to control said first society in their meetings, by their superior numbers, is a perverting of the privilege the law granted to them, to the oppression of their neighbors in the first society.

The jury went out and returned with a verdict in favor of the plaintiffs, and £15 damages.

Upon a suggestion from the bench, that as the right was the principal question, and the book of records could be of no use to any but the plaintiffs, and that the book and not damages, was the object of the suit, the parties had better compromise the matter. Col. Grosvenor who was present, declared in behalf of the defendants and said Catholic Society, that he acquiesced in the decision of the court, and that the book should be delivered. The damages were remitted to forty shillings.

I would observe, that although this is the law where a new church is wholly or principally formed from one society, yet, should a new church be formed, by taking a few members from a number of other churches, the law might be otherwise, and it would be necessary for them to lodge certificates agreeable to the first paragraph of the law.

PERKINS V. PERKINS, JR.

**Where an assignment of a note contains also an express promise that it shall be paid by the time set, an action will lie against the assignor, without suing the original promisor.**

ACTION of the case; declaring, that the defendant on the 1st of July, A. D. 1790, was indebted to the plaintiff £80 lawful money, and in order to pay it, the defendant assigned and indorsed to the plaintiff, a note executed to the defendant by John and Thomas Stowel, dated May 6, 1789, whereby for value received in a certain jack ass, they promised the defendant six likely mules, one year old, out of the first crop from said jack, which was to be kept for covering only: That the indorsement on said note was in the words following, viz. For value received I do assign and warrant the within obligation unto Samuel Perkins, and promise that the within mentioned six yearling mules shall be delivered to him by the 1st of June, A. D. 1792. E. Perkins, Jr. Which note and indorsement the plaintiff received in payment of his said debt; that said Stowels had never delivered said mules, nor paid their said note to the plaintiff, nor had the defendant ever performed his promise contained in said indorsement; that said six mules were worth £80 lawful money. Damage £80. Demurrer to the declaration.

Judgment — That the plaintiff's declaration was sufficient. It was not necessary that the plaintiff should sue the Stowels upon their note, it was sufficient that they have not paid it; for the indorsement contains in it an original undertaking and promise, that said mules should be delivered by the 1st of June A. D. 1792, upon which the action is brought, and not upon the warranty.

BRANCH V. RILEY.

**It is no excuse upon oyer, to say that the writing is lost, unless the plea contains a good excuse for not having it — in a hearing in damages upon a default, the court cannot make an offset of a demand, which the defendant has against the plaintiff, although it may arise out of the same transaction.**

ACTION on a note, dated 21st of April A. D. 1790, which is, "For value received in a jack ass, I promise to pay seven

likely mules, four months old, by the 1st of October A. D. 1791." The plaintiff averred said mules were worth £60, etc.

Plea in bar — That at the time of executing said note the plaintiff executed to the defendant a writing, wherein he agreed, that in case said jack proved deficient in begetting of mules, he would take him back and replace another in his stead that would be sufficient; and in case the second proved insufficient, said note should be delivered up and canceled; averring that said first jack was wholly deficient; that he returned him, received a second which was also deficient; whereby the defendant was exonerated from said note.

The plaintiff prayed oyer of said writing. The defendant in excuse said it was lost. The court judged the excuse to be insufficient and ordered the writing to be produced; upon which the defendant was defaulted, and upon a hearing in damages, the defendant moved to introduce parol testimony to prove the contents of said writing.

By the Court. This testimony cannot be received. The defendant by being defaulted has admitted the plaintiff's right of action, and no sufficient excuse is assigned why he cannot produce said writing; its being lost may be the effect of his own negligence and not of any inevitable accident. Besides, if he has such a writing, his proper remedy is by action upon it. See Phillips v. Halsey, New London, March Term, A. D. 1790.

WOODWORTH v. CLARK.

**An issue must be directly answered.**

Error to reverse a judgment of a single minister of justice, in an action brought by Clark against Woodworth upon a note. Woodworth plead specially in bar — That said note was extorted from him by duress, etc. The facts plead in bar were traversed, on which the parties were at issue. Judgment — That the plea and rejoinder and matters therein alleged, are

not so proved as to amount to and be a sufficient bar to said action, and that the plaintiff recover.

Error assigned — That the judgment did not answer the issue.

Judgment — Manifest error. All questions of fact put in issue to the court or jury are to be directly answered by finding them to be true or not true. See Bacon v. Child et al. Windham, September Term, 1792.

BUNDY v. WILLIAMS, EXECUTOR OF JOHN WILLIAMS.

Action on a joint covenant survives against the surviving covenantor.

ACTION upon the covenants in a deed, declaring that on the 1st of June A. D. 1760, said John Williams, Hezekiah Sabin and Mary Sabin were administrators on the estate of Noah Sabin deceased; that pursuant to a resolve of the general assembly, they sold a certain piece of land belonging to the estate of said Noah to John Eaton, for £2 10s. lawful money, and in and by their deed executed to said Eaton of said land, they covenanted that they were well seized and had good right to sell the same as the estate of said Noah, and warranted the same to said Eaton, his heirs and assigns; that said Eaton sold and conveyed said land by deed to Wheaton with like covenants of seisin and warranty, and said Wheaton, by deed with like covenants sold and conveyed said land to the plaintiff; that the plaintiff had been evicted of said land in a due course of law, by the heirs of Noah Sabin; that said Hezekiah Sabin died before the year A. D. 1762; that said John Williams died in A. D. 1766 and left a plentiful estate, of whose last will the defendant is executor; that the said Mary was also dead and had left no estate, executor or administrator.

The defendant demurred to the declaration.

Judgment — That the declaration is insufficient. Although in chancery the plaintiff's remedy is against all the adminis-

trators who joined in the covenants, yet the legal remedy survives only against the surviving covenantor and her legal representative.

Query — The reason why the remedy in such case ought not to be the same at law as in chancery.

### Webb v. Fitch.

**It appearing in a declaration for slander that the crime charged by the words, was more than a year before the speaking of them, is not a ground for arresting a verdict for the plaintiff.**

Action of defamation, for charging the plaintiff with having perjured himself in a certain cause — which was tried more than a year before the speaking the words.

Verdict for the plaintiff, and £12 damages.

Motion in arrest — The insufficiency of the declaration; that it appeared from the plaintiff's own showing that the perjury charged by the words, was more than a year before the speaking of them, and the plaintiff could not then, nor at any time since, have been prosecuted for it if they were true.

The motion was determined to be insufficient and judgment was for the plaintiff. The mere liability to a prosecution for the crime, does not constitute the whole ground of an action for words. The jury have found the defendant guilty and there is not sufficient grounds to arrest the judgment.

### Geary v. Shepard.

**Money in the hands of an officer not liable to be attached and taken from him.**

Action of trover for eighty-three pieces of gold coin, amounting to £157 10s. 8d. lawful money. Plea — Not guilty. Issue to the court.

The plaintiff was overseer to Jesse Spalding, and had an execution in his favor against Dunlap for the aforesaid sum, which it was the duty of Abraham Shepard to pay; Abraham Shepard prayed out an attachment against said Jesse, directed to one Gallop an indifferent person to serve, without his knowledge, who declined serving it, and said Abraham then inserts the name of the defendant his brother in the

writ, in the place of Gallop's, without the knowledge of the justice who signed it; the defendant then went with said Abraham to the plaintiff's, where the officer was who had the execution in favor of said Jesse, and said Abraham paid the money upon the table, the plaintiff indorsed said execution satisfied, as overseer or agent to said Jesse; the defendant attached it as the property of said Jesse, by virtue of said Abraham's attachment and took it away; said Abraham fearing his said writ would fail, prayed out another attachment against said Jesse for the same cause, dropped the first and attached the same money that the defendant had taken, and that suit was now depending in court.

The court found the defendant guilty and gave judgment for the plaintiff to recover the whole sum in damages.

The property in the money accompanied the possession and was in the plaintiff and not liable to be attached, in this way, for a debt of Jesse Spalding's. The defendant had no good authority to attach the money, even had it been attachable, as the money of said Jesse's; and its being taken out of his hands by the second attachment, cannot mitigate the damages, although it might furnish a good cause of action against the officer who took it. See the case of Willes v. Pitkin, *ante*.

## Hooper v. Benson.

**Where money is taken from a garnishee by a compulsory process in the law — it ought to excuse him.**

Action on note, dated 25th of November 1789 for £30, payable in net stock, corn, etc. on the 20th December A. D. 1790 with interest. Plea — Full payment. Issue to the jury.

On the 27th of April A. D. 1790 Hooper for a valuable consideration, indorsed this note to a Mr. Williams of Roxbury, of which the defendant had notice; Dr. Dyer and one Compstock, creditors of Hooper, instituted suits against him for their debts and described him to be an absconding debtor, and on the 8th of July A. D. 1790, copies were left with the defendant in service as debtor to said Hooper, and judgments were afterwards recovered in said suits against said Hooper, and a *scire facias* was brought on each, against

the defendant; the defendant paid to said Williams on the 2d of April 1791 £14 12s. which was indorsed on the note, he notified said Williams of the suits of Dyer and Compstock against him and called on him to defend against them; Williams took very little pains in the suits, referred him to some witnesses whose depositions he took and made the best defense he could for Williams; but they recovered against him. Dr. Dyer recovered judgment and execution for £16 1s. 9d., and Compstock for £17 19s., which were levied and collected of the defendant, which more than paid said note.

The jury found that the defendant had made full payment of the note on which, etc. which was accepted by the court; there being only three judges.

CHAUNCY, J., dissented, upon the ground that by the assignment of the note, the property was vested in said Williams, and that a recovery ought to be had for his benefit, and that the recovery by the creditors against the defendant was wrong.

ADAMS and ROOT accepted the verdict, upon the principle that admitting the property to be vested in Williams, by the assignment, yet as the defendant was unable to defend against the suits of the creditors, by all the means said Williams furnished, and being compelled to pay them, it would be unreasonable to put him to a suit to recover the money back. If the money was Williams's and Dyer and Compstock had no right in equity to hold it, let him be at the expense of recovering it.

## CHANDLER v. PHILLIPS.

**Possession doth not begin to run against the remainderman until after the death of the particular tenant.**

ACTION of ejectment for a farm of land, lying in Woodstock. Plea — No wrong or disseisin. Issue to the jury.

The case was — Moses Chandler purchased the farm of one Kingsley and continued in the possession of it until A. D. 1764, when he gave up the possession of it to his father Joshua Chandler. On the 8th day of February A. D. 1764,

Joshua the father gave a deed of the north half of his home farm to his son Moses. On the 30th of September A. D. 1767, Joshua the father made his will, and devised the farm in question, as follows, viz. The farm I purchased of my son Moses by deed dated the 8th of February A. D. 1764, I give the use and improvement of, to my beloved wife during her widowhood, and the remainder of said estate I give to my two grandsons, John and William, sons of my son Joshua Chandler, in fee-simple. The deed of the farm referred to in Joshua the father's will, was not upon record nor to be found. The father possessed it by a part of his family residing upon it till his death, which happened some time in A. D. 1768. His widow went into the possession with her son Joshua — who having purchased of his mother her life in said estate for £40, in A. D. 1777 he gave a deed of it to one Broadway, and Broadway conveyed it to Aldridge, and took from him a bond to indemnify him against the note he gave for it to Joshua Chandler. Said Joshua went to the British, and said note was never paid. Aldridge sold the farm to the defendant for £ who went into possession in A. D. 1780. Mrs. Chandler, the widow died, and this suit was commenced within fifteen years from her death.

Verdict and judgment for the plaintiff.

There is every reason to suppose that there was a deed given of said farm, by said Moses to his father, on the 8th of February A. D. 1764, which is referred to in the father's will. But it is clear, that from that time said farm was claimed and possessed by the father, and under title derived from him, until the death of his widow; that there was no possession that had run against the remaindermen said John and William until then, and since that event fifteen years had not elapsed before the commencement of this action.

ROBBINS v. BACON.

A defendant in a *scire facias* cannot take advantage of anything which might have been plead to the original action.

SCIRE FACIAS, declaring that upon her complaint exhibited to a justice of the peace, charging one Joseph Sheffield with having begotten her with child of a bastard, etc., praying process against him; that he was taken and had before said justice, and pursuant to an order of said justice the defendant became bound jointly and severally with said Sheffield in a recognizance of £50, that said Sheffield should appear before the then next County Court and answer to said complaint and abide final judgment thereon; that before the County Court she appeared and prosecuted her complaint; that said Joseph Sheffield being three times publicly called, made default of appearing; that thereupon she recovered judgment by the consideration of said court, against said Sheffield; that he was the father of said child, and that he should stand charged for the maintenance thereof, with the assistance of the mother at two shillings six pence per week, etc. that said Sheffield had absconded and gone out of the state and left no interest, and execution had been duly returned *non est inventus* — praying for a remedy in the premises.

Plea in bar — That said original complaint was essentially defective, it did not state where said child was born — nor that it was begotten in fornication.

Upon motion of the plaintiff, she was allowed by the court upon payment of cost to insert in her complaint both of said allegations. Whereby the complaint upon which said judgment was rendered was materially different from that upon which said bond was given. Demurrer.

Judgment — Plea insufficient. The bail cannot take advantage, upon a *scire facias*, of any errors in the original process, except such as render the judgment a perfect nullity. Amendments are by statute, and a process amended is in consideration of law, the same process; and this is contemplated by the bondsman, whenever he gives bail.

JANES v. FINNY.

An agreement respecting leasing and conveying real estate and not to be performed in one year, is within the statute, made to prevent frauds and perjuries.

ACTION of the case, declaring upon a parol agreement, that in consideration of certain services to be performed by the plaintiff, the defendant on the 27th of February A. D. 17 agreed to let to the plaintiff a clothier's mill and business, for the term of three years then next, and to rebuild said mill by the 1st of September then next, and to put it in good repair. Also to find dyeing stuff for said term, and to let the plaintiff have half an acre of land for a garden, to find him fire wood and the use of one-half of the defendant's dwelling-house for three years and to go into possession on the 1st of May next — which he had not performed, etc.

The defendant plead the Statute against Frauds and Perjuries in bar. Demurrer.

Judgment — That the plea is sufficient. This action is brought upon an agreement respecting lands and real property, and is not to be performed within one year.

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**NEW LONDON COUNTY, MARCH TERM, A. D. 1793.**

ABEL v. ABEL.

A traverse of the plaintiff's title not such a plea of title as will take the action from a justice.

ACTION for a trespass committed upon land, brought before a justice, declaring that for more than four years before the doing of the facts complained of, he was seized and possessed of the land and place where, etc.

The defendant plead — That for more than one year before said trespass was said to have been committed, he was actually and peaceably possessed of the land and place where said facts were done, and that the plaintiff ought to be barred

without that, that the plaintiff for more than four years before the doing of the facts complained of was seized and possessed in manner and form as alleged in his declaration.

Upon which said justice took a bond, and handed said cause over to the County Court, upon the idea that the title was to be tried, and from the County Court said cause was appealed to this court; and now the plaintiff moved that said cause be erased, as the defendant had set up no title in his plea that he relied upon, and had only averred a one year's possession, as inducement to his traverse of the plaintiff's title.

Judgment — That the cause was not regularly before the court, and accordingly was erased from the docket. The statute evidently contemplates such a plea as will put the defendant's title directly in issue. This plea amounts to no more than the general issue, that the defendant is not guilty.

### Steward v. Brewster and Boardman.

Where two are joined in a *scire facias* which could not be joined, and are acquitted, the court will allow to each his full cost.

Scire Facias, declaring that he recovered a judgment against Jonathan Boardman, an absent absconding debtor, for £83; that the defendants were severally served with a copy in said suit, as agents, factors, debtors, etc.. to said Jonathan Boardman, and that they had his effects in their hands at the time said copies were left in service.

No exception was taken to the defendants being joined in said *scire facias*, and the cause was heard upon the merits; and judgment for the defendants to recover their cost; and cost was taxed in favor of each defendant, his travel, attendance, witnesses and what he paid for court fees, upon the principle that the plaintiff's challenge upon them was several and not joint.

DUNHAM v. BRAIMAN.

A writ of error will not lie against a judgment in abatement, until the final judgment is rendered.

Where the final judgment is omitted in a writ of error, it may be amended on payment of cost.

ERROR, complaining of a judgment of the County Court, upon pleas in abatement in a certain action, brought by Braiman against Dunham without setting forth any final judgment in said cause, and for this cause a special demurrer was given.

The plaintiff in error moved to amend his writ by inserting therein the record of the final judgment rendered upon the merits — which was allowed by the court upon payment of cost.

SPALDING v. IMLAY, LOAN OFFICER.

A foreign attachment will not hold against the loan officer of the United States, or other public officer.

SCIRE FACIAS, declaring, that he recovered a judgment against Daniel Stanton an absent absconding debtor, for £22 7s.; and that the defendant was regularly served with a copy of the process as agent, factor, etc., to said Stanton, and had the effects of said Stanton in his hands when said copy was left in service.

Plea in bar — That he was not otherwise agent, trustee, or debtor to said Stanton, then as commissioner of loans to the United States, to pay the sums due from the United States, to certain invalids, upon the pension list, on proper application, agreeable to the rules and regulations of the treasury and not otherwise, and that there was due from the United States to said Stanton, £36 which he was ready to pay upon proper application. Demurrer.

Before the counsel had gone through the argument, upon some suggestions from the court, the plaintiff withdrew his action. By the rules and regulations of the United States, money taken from their loan officer in this manner would not justify him in an account with their treasurer — besides it would involve the defendant in perpetual difficulty and disputes.

BULKLEY v. TREADWAY.

**A plaintiff may withdraw his action any time before verdict is delivered to the clerk.**

ACTION of ejectment. Plea — No wrong, etc. The jury returned into court with a verdict, and as the constable was handing the verdict from the foreman to the clerk, the plaintiff declared that he withdrew the action.

A question was made — Whether the plaintiff might withdraw his action, after the jury had delivered their verdict in court, to the constable.

By the COURT. The plaintiff may withdraw his action any time, before the verdict is in the actual possession of the court, by being delivered into the hands of the clerk.

DOW v. KELLY.

**City sheriffs have power to serve all lawful writs directed to them in said city.**

ERROR to reverse a judgment of the County Court, in an action brought by Dow v. Kelly, on a note, by writ directed to the sheriff of the city of Norwich to serve and return; said Kelly was also described to be of said city. The writ was served and returned by the city sheriff, to the County Court to which it was returnable.

Plea in abatement — That by law the city sheriff had right to serve no writs, but such as were returnable before the City Court, mayor, or aldermen, and that said service was void.

Judgment — That the plea was sufficient.

Error assigned — That judgment ought to have been that said plea was insufficient.

And by the COURT. There is manifest error in the judgment complained of. Although, the mayor and aldermen have right to sign writs returnable before some court in the corporation only; yet the sheriffs of said city within the limits of said city, have the same powers and authorities and are

liable to the same suits and penalties, for neglect of duty, in any case whatever, to all intents and purposes, as sheriffs of the counties are; and must obey all lawful writs directed to them, by courts or magistrates not of the city, which are to be executed within the city.

BOLES v. CALKINS.

After the condition of a mortgage is broken the mortgagor's remedy for a deed is by application to chancery.

PETITION in chancery; showing, that on the 8th of November 1783, the petitioner mortgaged his house, etc. to the petitionee, for £150, to be paid in two years; that he failed of paying the money by the time; and that the premises were worth £600 lawful money; that the interest on the debt had been paid up to June last; and that said Calkins had sued him for said mortgaged premises, and threatened to turn him out of doors; praying for a further time of redemption, upon his paying what should be justly due on said mortgage.

Plea in abatement — That the petitioner had not tendered the money due on said mortgage; and no account was necessary to be taken. The petition therefore was unnecessary and idle.

Judgment — That the plea in abatement was insufficient; it was the duty of the mortgagor to have paid the money by the day, and on his failing to do it, the estate became vested at law in the mortgagee; and the mortgagor hath no means in his power, but by the aid of a court of chancery, to get reinvested with the title.

This petition is no bar to the mortgagee's recovering at law, which must be at the costs of the mortgagor; unless, it should appear that the mortgagee had been guilty of some fault. The court saw no reason for abating the petition.

MONROE v. MAPLES ET AL.

In an action for a malicious prosecution the plaintiff must show that he was acquitted.

An action of the case for a perjury will not lie against a witness after a lapse of years.

ACTION of the case; declaring, that on or about the 1st of August A. D. 1788, the defendants in Montville, did combine

together, and maliciously conspire to injure and destroy the plaintiff's property and reputation, and did falsely and corruptly accuse the plaintiff of having feloniously contrived and conspired with Joshua Valet, James Chappel, and Lydia his wife, and Sarah Monroe, to commit a secret assault on the body of Marcia Maples, and her to imprison for four hours, and in pursuance of said wicked combination aforesaid, the defendants did in the name of said Marcia, make and exhibit a false complaint against the plaintiff, and said Joshua Valet, etc., to Justice Raymond, and prayed out a warrant thereon, by which he was arrested and had before William Hillhouse, Esq. assistant, on the 24th of August 1788; and the defendants did before said assistant, falsely and maliciously accuse the plaintiff of the facts charged in said complaint, by means whereof he was bound to the County Court; and before said County Court, the defendants were admitted as witnesses to said complaint, and then and there did on oath falsely declare that the plaintiff did aid and assist Joshua Valet in the night of the 27th of July, A. D., 1788, to commit a rape upon the body of said Marcia Maples; when the defendants well knew that the plaintiff was not accessary to any abuse offered by said Valet to said Marcia on said evening; but caused him to be made a party in order to prevent his being a witness; that in fact said Marcia received no abuse that night from any person, and the whole was calculated and done to cover her shame; that by means of the defendants maliciously conspiring to accuse him, and falsely swearing to condemn him as aforesaid, he was convicted on said complaint, before said County Court; fined £10; and amerced in damages £60 lawful money. When the defendants at said County Court, and at all times knew, that the facts charged in said complaint against him were false, and to his damage £560; per writ dated the 6th of January A. D. 1792. Demurrer to the declaration. And,

Judgment — That the declaration was insufficient.

If this is to be considered as an action upon the case for a malicious prosecution, the plaintiff hath not shown that he was acquitted, but that he was convicted. If as an action for

the injury done him by the defendants' false swearing and perjury, it is not brought upon the statute, nor within the time limited by law; and it would be of dangerous consequence to admit actions of this nature to lie against witnesses after so great a lapse of time.

LARABEE V. LARABEE

A devise to a man and the male heir of his body — will enable his sons to take in the same manner and proportion, as by law they would inherit their father's estate.

ACTION for the partition of a certain tract of land; declaring, that they held in such manner and proportion, as that the plaintiff had right to have aparted and set out to him one-third of said tract, and the defendant two-thirds of said tract.

Plea — That the plaintiff and defendant did not hold in manner and proportion as set forth in the declaration. Issue to the court.

The plaintiff produced the will of Nathaniel Larabee, dated the 31st of March, A. D. 1738, proved and approved June the 8th, A. D. 1741, which was in the words following, viz. "I give to my wife Sarah, the whole of my estate during her natural life, the paying my debts, and after her decease, I give the same to my kinsman James Larabee, and to the male heir of his body lawfully begotten in fee-tail, viz. to the male heir of my said kinsman James Larabee, by succession, from generation to generation forever"— the said Nathaniel was seized at the date of the will, and at the time of his death. The wife survived the testator forty years; she also survived said James Larabee, several years, and died; that said James had two sons only, the plaintiff and defendant. Upon the death of the wife said Sarah, the defendant went into possession of the whole, and had remained in ever since. The defendant demurred to the evidence, and the plaintiff joined the demurrer.

Judgment — That the evidence is sufficient; and that the plaintiff and defendant do hold in manner and proportion as set forth in the plaintiff's declaration, etc.

An heir, is whoever by the laws of a country, hath right

to inherit or succeed to an estate immediately upon the death of the owner; and is different as the law varies in different countries. In England, the eldest son succeeds to the real estate of his parent, etc.— he is the heir: In case there is no son, then all the daughters succeed to his estate as co-parceners — they are the heir. In Connecticut, all the children both sons and daughters, succeed to the estate in equal shares, except the eldest son, who hath a double share. Here, therefore, all the children constitute the heir. The words in the will, " To my kinsman James Larabee, and the male heir of his body "— designates the person or persons to take of the male line, lawfully begotten of his body to be the same, that by law had right to inherit or succeed to the estate of his said kinsman James — in exclusion of the females. This necessarily includes all the sons of his said kinsman — and as they are to take as heir, that is, in manner and proportion as his kinsman's heirs would take his estate; and that is two parts to the eldest son, and one part to the youngest.

James Larabee's dying before the widow of Nathaniel, to whom the estate was given for life, hath no effect to prevent the estate's passing to the male heir of James — for James had only a life estate, and that upon condition he survived the widow — his male heirs took by force of the will, as immediate devisees of the estate, after the lives of the widow and said James were spent; and whenever that event took place the estate vested.

TAPLIFF v DAVIS.

ACTION of ejectment for a piece of land, described in the declaration. Plea — Not guilty. Issue to the court.

One Stanton was owner of the land; the defendant had an execution against him — levied it upon this land in A. D. 1784, and in September A. D. 1784 had it recorded in the office of the town clerk, and returned it to the office of the county clerk from whence it issued, on the 2d of December A. D. 1791, and caused it to be recorded there on the 26th of September A. D. 1792. The plaintiff attached this land on the 5th of February A. D. 1791 for a debt due to him

from said Stanton — got judgment and execution for said debt, and levied the execution upon said land on the 6th of October A. D. 1791 — which levy was recorded in the town clerk's office on the 2d of November A D. 1791, and in the office of the county clerk on the 5th of January A D. 1792. It appeared that the plaintiff knew that the defendant had levied his execution upon this land, and that it was not recorded in the county clerk's office when he attached it.

Judgment — That the defendant is guilty and for the plaintiff to recover.

The statute is positive, that the execution and officer's return, must be recorded in the office of the clerk of the court from whence it issued, in order to complete the title; but this was not done by the defendant until months after the plaintiff's title was perfected. There appears to be no fraud practiced by the plaintiff, he was vigilant in securing his debt; but there appears to be great inattention and gross negligence on the part of the defendant.

### Woodbridge v. Winthrop.

A garnishee who once admits himself to be liable upon record, is estopped from saying afterwards, that he is not.

A garnishee may avail himself upon a *scire facias* of his principal's not being an absconding debtor at the time of the copy's being left in service.

Scire Facias against said Winthrop as agent, factor, trustee, etc. to Joseph Woodbridge, an absent absconding debtor.

Plea in bar — That said Joseph was not at the date and service of the original writ, an absent absconding debtor; and the defendant had paid and delivered to said Joseph all the effects of said Joseph's which were in his hand and possession.

Plaintiff replied — That said Joseph was described in said original writ and in the copy left with the defendant, to be an absent absconding debtor, by which he had right by law and in fact did appear and defend said Joseph, his principal in said cause; that the defendant having in his hands a much greater sum than was due to the plaintiff, said Joseph instituted a suit against him for it, and before the special Superior

Court, holden at New London in July A. D. 1789, recovered judgment for the same against the defendant, at which time the defendant moved said court for a stay of said Joseph's execution, upon the ground of the plaintiff's foreign attachment lying against him; upon which said court ordered said execution to be stayed until said Joseph procured and gave to the defendant a good bond with surety sufficient to indemnify him against said foreign attachment, which was accordingly done before said execution was taken out; that said Joseph was a bankrupt, and the defendant estopped to say that said Joseph was not an absent absconding debtor, upon the *scire facias*.

The defendant rejoined, traversing the defendant's appearing and taking upon him the defense of said Joseph in the original suit, as attorney to him. To which the plaintiff demurred.

Judgment — That the rejoinder of the defendant is insufficient.

The court supposed that the defendant had admitted himself to be liable on said foreign attachment, by moving for a stay of said Joseph's execution on that account, until he was indemnified against it; and the court's granting said motion and ordering said execution to be stayed, until he was indemnified by said Joseph against said foreign attachment, amounted to a confession of judgment against himself and recognized by the court, by ordering said execution to be stayed till indemnified — whereby he was estopped to plead that said Joseph was not an absent absconding debtor, or in any way to avail himself of the payment made by him to said Joseph under these circumstances: For the whole ground of the motion and of the court's order upon it, is the admission of the defendant, that he was liable on said foreign attachment; for if said Joseph was not an absent and absconding debtor, at the time the copy of the original writ was left with him in service, he must have known it at the time when the special Superior Court sat in July A. D. 1789, and that was a good defense for a garnishee upon a *scire facias*, and so needed not to have moved the court for a suspension of the execution.

This judgment was reversed in the Supreme Court of Errors, in June A. D. 1794 — for the following reasons.

THERE are two questions which arise on these pleadings — 1st. Whether Winthrop, the garnishee, had a right to plead in bar of the suit against him, that Joseph Woodbridge, the defendant in the original action, was not an absent or absconding debtor, as he has done, and if so, 2d. Whether this is a good defense.

As to the first point, it may be laid down as a general rule, that what may be pleaded to the original action cannot regularly be pleaded to the *scire facias*. And it may also be admitted, that the defendant in the original action might himself have taken advantage of the misdescription in question, by way of abatement, and if he should waive this advantage and plead to the merits, he would afterwards be estopped to say he was not an absent or absconding debtor. But it cannot be admitted that the garnishee, by force of the statute, entitled an act for the recovery of debts out of the estate or effects of absent or absconding debtors, his principal not being in fact an absent or absconding debtor, might, as attorney created by the said statute have taken advantage of the same misdescription, for his right of appearing and defending in the suit rests wholly on this ground, that he is in truth the factor, agent or trustee of the defendant, being an absent or absconding debtor, and if the defendant be not in fact an absent or absconding debtor, no power is given to the garnishee by the statute as attorney in the case; and if he should appear and plead in abatement of the suit, that the defendant was not an absent or absconding debtor, he would assume a fact, which if true, would destroy his own existence as an attorney, and evince that he had no business to intermeddle in the case.

But further, if it should be admitted, that he had right to appear and to plead to this fact in abatement and he should neglect to do it, and plead to the merits, still as this defense respects his principal merely, his principal only would be

bound by it, and in that case he alone would be estopped to say he was not an absent absconding debtor, for the defense of the attorney would be contemplated in the same light as if it had been made by the principal himself actually present in court, and could no more prejudice his future defense as garnishee; but clearly if such defense had been made by the principal himself present in court, it would be unreasonable that the garnishee, should by such defense over which he had no control, be estopped to plead the fact to the *scire facias*, if it would make him a good defense.

He ought not indeed to be allowed to plead any matter which goes to show that the plaintiff in the original action, had no just demand against the defendant, or that the judgment ought in any manner to be altered or varied. Yet if the fact, that the original debtor was not an absent or absconding debtor, would afford a good defense against the *scire facias* by the statute, the garnishee ought to be allowed to plead it, upon either principle of the foregoing reasoning; as his defense rests upon the provisions of the statute, and is totally distinct from the defense in the original action, neither the subject nor the parties being the same.

As to the second point, Whether the plea that the defendant in the original action was not an absent or absconding debtor be a good defense against a *scire facias*, as it is pleaded, there can be little doubt, for it stands confessed upon the pleadings to be a fact, though the plaintiff in his reply endeavors to avoid it, by saying that the fact could not now be called in question. But if the foregoing reasoning be conclusive, the fact is well pleaded, and consequently it appears that the defendant in the original action was not an absent or absconding debtor, this being so, the effects of the original defendant, in his, the garnishee's hands were not liable and subject to execution, granted upon the judgment in said action, for by the express words of the statute, they are liable and holden, subject to such execution only, in case the defendant in the original action was an absent or absconding debtor.

# Points of Law Adjudged, and Rules of Practice.

In order to render this publication more useful, I have thought proper to subjoin for the benefit of students and young practitioners in the law, certain law points which have been settled and adjudged, a part of which do not fall within the time of the preceding reports. Also certain rules of proceeding and practice, adopted and established in the Superior Court.

An action at law, lies in this state, in favor of an indorsee of a note in his own name, which was executed and indorsed in another state, where by law such note is negotiable.

An action of the case lies in favor of an assignee of a note, or bond, for valuable consideration, against the promisor or obligor, where the promisee or obligee is bankrupt, and the promisor has had notice of the assignment and of the bankruptcy of the promisee, before payment made to the promisee, or a discharge obtained from him; such payment or discharge notwithstanding, upon the same grounds that a suit in chancery, has heretofore been sustained.

Where a specialty is destroyed or lost by accident or misfortune, or has unfairly got into the possession of the adverse party, the obligor or promisor; the plaintiff may bring his action and declare upon it, and set forth the destruction or loss of it, or that it has got into the hands of the defendant, as the case may be; and the plaintiff will be excused from producing it on oyer, and will be permitted to prove the loss of it or that it is in the defendant's possession: And also to prove the execution and tenor of it, by a copy or by parol evidence.

A debt which is assigned for a valuable consideration, is not afterwards any part of the effects of the assignor, in the hands of the debtor, and is not liable to be taken by the creditors of the assignor, by a foreign attachment.

A general action of *indebitatus assumpsit*, will not lie, for a mistake in a settlement, or where the plaintiff relies on special circumstances to make out his case; but the action must be special, setting forth the particular grounds of his demand.

In an action upon a bond with a condition, it is not necessary that the plaintiff should set forth or declare upon the condition of the bond, for that is for the benefit of the defendant, and may be introduced in the pleadings.

Where an action is commenced by an attachment to secure the debt by attaching property, and by reason of some defect in the service, the property is not holden; or where there happens to be some fatal defect in the plaintiff's writ or declaration, which is not amendable; whereby his suit must fail; in either of the above cases, the plaintiff may institute a second action for the same cause, before the court arrives in which the first can be withdrawn; and the latter will not be considered as being brought for vexation, nor abate by reason of the pendency of the first; provided the first is not appeared in, or is withdrawn as soon as it can be done.

An action of debt will not lie upon a judgment rendered in this state, where both the parties are living; unless it be for the purpose of securing property to satisfy the judgment which could not otherways be done; as where the debtor is become bankrupt and absconded, and left debts due to him or other property in the hands of his agent, etc. which cannot be taken hold of, but by foreign attachment; or for some other end, which the plaintiff cannot avail himself of without, by his execution.

A writ of error is not a *supersedeas* of an execution, unless bonds are given at the time of praying it out agreeable to the statute. Nor will it then be a *supersedeas* to stay proceedings, where the execution has been levied.

The plaintiff's own bond, is no security in contemplation of law, upon a writ of replevin.

A writ of attachment served as a summons by reading or leaving a copy at the defendant's usual place of abode, without attaching either the property or person of the defendant, is sufficient service to hold him to trial.

A bond given at the praying out of a writ in favor of a plaintiff, who is not an inhabitant of this state, or is unable to respond the cost, for the prosecution of the action; is not within the limitation of twelve months prescribed by the statute concerning bail, to suits brought on bail bonds to the sheriff, or special bail given in court to the action.

### When Causes must be Entered.

All writs and petitions returnable to the Superior Court, must be returned to the clerk, before the second opening of the court.

By statute, all appeals from the county, city and probate courts must be entered in the docket of the Superior Court

before the second opening of said court, and not after, unless the appellant pays down the cost arisen in the action to that time, to the appellee, then he may enter his action any time before the jury are dismissed. And in case the appellant doth not enter said cause before the jury are dismissed, the appellee may enter it, if it be an appeal from the County Court, and have the judgment of the court below affirmed with additional cost.

And by the court, no appeal may be received and entered in the docket by the clerk, unless the copies of the case, certified by the clerk of the court appealed from, are delivered to him. This rule extends to all cases to be entered upon granting of new trials, and on reversals by error.

### Time of Pleading.

All original pleas in abatement made in the Superior Court in civil actions are to be made and delivered to the adverse party or his attorney, if present, if not to the clerk of the court by the opening of the court in the afternoon of the second day of the session.

All other pleas, as a demurrer to the declaration, general issue, or special plea in bar, are to be made and delivered, as aforesaid, by the opening of the court in the morning of the third day, in all the counties where the term is but one week; and by the opening of the court in the morning of the fourth day of the session where the term is more than one week. And the rule is the same, with respect to altering pleas which come up from the County and City Courts by appeal.

When a defendant appeals from a judgment of the County or City Court, upon a plea in abatement, he must abide by his plea in abatement exhibited below, without alteration or amendment. For if he fails to make good his plea, he will be subjected to the cost; and it has been determined, that where the plaintiff appeals from a judgment on pleas in abatement, the defendant may not alter his plea in abatement.

CONCERNING AMENDMENTS

By statute, if the plaintiff's writ abates, upon payment of cost, he shall have liberty to amend it.

By the court, the plaintiff before plea pleaded, may admit his writ to abate, and upon motion, be allowed upon payment of cost, to amend it.

By statute, whensoever a party shall suppose that he has missed his plea, which would have saved him in his just cause; he shall have liberty to alter his plea; and reasonable time shall be allowed to the adverse party to make answer thereto; and if said new plea be found insufficient for justifying him, reasonable satisfaction shall be awarded to the other party, by the court, for the delay, etc.

By the court, liberty may be given to a party to alter his plea, at any time in the course of the trial, where it appears he has missed it.

And by a late statute, the courts of law and chancery are authorized to permit the parties respectively, at any time, to amend any defect, mistake or informality, in the writ, declaration, pleadings or other parts of the record, in civil causes pending before them, upon payment of the lawful cost to the other party, at the discretion of the court.

By the court, the allowing of the amendment and whether cost shall be paid or not, are both at the discretion of the court.

And, that where the amendment moved for, if permitted, would alter the nature of the action, and make a new writ or declaration, it cannot be permitted; not being within the meaning of the statute; and would require twelve days' notice.

If a cause is entered in the docket, as coming here by appeal, and upon view of it is not appealable; the court will *ex-officio* dismiss it, though no plea in abatement is offered; but in such case, no cost is taxed for either party.

If an appeal abates because the damages demanded do not exceed $70, it cannot be amended by increasing the sum demanded, although both parties agree to it. For it not being appealable when in the County Court, it is not regularly before this court, and the agreement of the parties cannot alter the law.

If the defendant justifies upon a plea of title, in an action of trespass, brought before a justice he must abide by his plea of title; and may not resort to any other defense.

### Of Appeals in Certain Cases.

An appeal lies from a judgment by default and a hearing in damages, but the defendant can make no other defense.

An appeal lies for a defendant, from a judgment against him, upon *nihil dicit;* and he may plead and defend before the court appealed to.

An appeal lies from a judgment upon a note for money only although it hath two subscribing witnesses, if one is dead or become interested, for it cannot be vouched by two witnesses.

In all pleas of abatement, an issue in law or in fact ought to be joined, and where the court determine the plea to be insufficient; the judgment is, that the defendants shall answer over to the action. But if the issue is joined to the jury, and they find against the defendant, the jury assess damages, for the plaintiff.

In an action brought on a specialty, or where a party sets forth his title specially, by certain deeds and conveyances, it is not necessary to allege a profert of them, yet oyer must be given of them, if asked for, unless excused for reasons alleged in the declaration or plea. And the rule is the same in chancery as at law, with respect to craving and giving of oyer.

Where special bail is given, and the judgment is in favor of the defendant; which afterwards is reversed upon a writ of error, and the plaintiff eventually recovers judgment against the defendant in said suit for his damages and cost; the special bail is exonerated.

### Of Pleas and Pleading.

A judgment upon demurrer, either general or special is final in a cause at law; yet the defendant upon motion may be heard in damages, as in case of a default.

A demurrer runs back through the whole record, and judgment will be according to the right of the cause on the whole record.

Matters of form, as duplicity, etc. cannot be taken advantage of under a general demurrer, but must be specially pointed out, and excepted to.

Regularly in pleading the defendant must confess and avoid or justify the charge brought against him, or traverse and deny it.

When all the allegations in a declaration or plea are traversed or denied, there is a complete issue; and it is proper for the party taking the traverse to put himself on the country. But where only a part of the allegations are traversed; or new matter is introduced; the plea must conclude with a verification, that the adverse party may have an opportunity, to answer over to the new matter, demur, or join in the traverse.

The traverse must be taken to some material point in the declaration or plea, which being found either way will put an end to the cause; or it will be ill upon a demurrer.

Regularly there cannot be a traverse upon a traverse, for that would tend to endlessness in pleading; yet where the defendant sets forth in his plea substantial matter, if true, to bar the plaintiff of his action, and concludes with a traverse of some immaterial part of the declaration; the plaintiff in his reply may traverse the substantial parts of the plea, without noticing the immaterial traverse. This is not a traverse upon a traverse in the sense of the rule; although it is a traverse after a traverse.

Whenever the defendant in his plea in bar, states the plaintiff's case to be different, from what it is alleged to be in the declaration, he must conclude with a traverse of the declaration. The same rule applies to the other parts of pleading.

In an action of trespass, which charges the defendant generally, and the defendant justifies at a particular time and place, he must plead that he is not guilty at any other time and place. But where the action is special for a trespass committed at a certain time and place, and he justifies at the particular time and place alleged, he need only aver that it is the same trespass complained of and not diverse.

Duplicity in pleading, doth not consist in the length of a declaration or plea, nor in the multiplicity of the facts alleged; provided they are necessary to make out the point of the action, defense or justification; but in setting forth different and distinct causes of action, or points of justification and defense.

A departure in pleading is where the plaintiff in his replication, resorts to and sets up a different ground or cause of action from that laid in his declaration; or where the defendant in his rejoinder, departs from the ground taken in his plea, and alleges new matter which doth not fortify the plea in bar.

### Concerning Evidence.

Persons who have been convicted of any infamous crime, as arson, forgery, burglary, perjury, theft, etc. are excluded

from testifying. Also all professed atheists who disbelieve the being of a GOD, and His moral government.

Persons interested in the question of fact in issue, and in the event of the suit, are excluded from being witnesses — husbands and wives cannot be witnesses for, or against each other, except in cases of personal abuse offered by one to the other.

The interest of a witness may be proved in either of the following ways, viz. by witnesses or by writings which show and evince his interest. Or 2dly, by examining the witness upon the *voire dire* oath — or by examining him touching his interest under the witness's oath. The party objecting may elect either of these methods to prove an interest; but is confined to the one which he elects.

If a witness has given a discharge of his interest, to the party objecting against him; and he refuses to produce it, parol evidence will be admitted to prove it.

Or where a discharge is tendered, by the witness, to the party objecting, and he refuses to receive it, upon its being lodged with the clerk of the court, for the use of the party, the witness will be admitted.

If a deed or other instrument in writing, which hath subscribing witnesses, is denied, other evidence will not be received to prove the execution of it, if those witnesses may be had, without producing them; except proof of what the party himself has confessed.

Bills of exception to evidence, are to be notified in court at the time of deciding upon the objection, and reduced to writing in form, and presented to the court or presiding judge, within twenty-four hours, after the verdict is accepted and recorded; and in trials to the court they must be presented as

aforesaid within twenty-four hours after judgment is given; exclusive of Sabbath-day, or they will not be received.

A demurrer to evidence is allowed, where the evidence is in writing, and is taken to the evidence of the plaintiff, before any is introduced on the part of the defendant, and admits all the facts and inferences of fact, which a jury might make; and submits to the court the question of law arising out of the evidence. And the same rule holds with respect to the plaintiff's demurring to the defendant's evidence.

When a demurrer to evidence is properly taken, the adverse party must join the demurrer: — and the jury will be discharged from the cause; after assessing the damages provisionally, in case the parties desire it. Otherwise the court, if the plaintiff recovers will assess the damages.

Challenges to the jury are either principal challenges or to the favor. A principal challenge is a peremptory exception which utterly disqualifies the juryman to try the cause — as his being so near related to one of the parties that the law forbids his judging between them — his being interested in the question or in the event of the suit — his having heard the cause from either of the parties or their agents — or having given his opinion in the cause — and his being infamous and by judgment of law disabled to be a juryman, or otherways by law disqualified.

Challenges to the favor are such exceptions as the parties may make or not, if they are waived at the proper time of taking them, the verdict will be good, and the party foreclosed, moving them in arrest of judgment.

If the jury are impaneled and sworn in a cause, and the declaration and pleadings are read, the jury are entitled to their fees; although the cause is withdrawn, nonsuited or dismissed, immediately after.

A plaintiff may not withdraw his action, or be nonsuited, after the jury have delivered their verdict into the hands of the clerk, if the court accepts the verdict; but he may withdraw while the verdict is in the hands of the officer who attends the jury, as it is passing from the foreman of the jury to the clerk; or in case the court return the jury to a second, or third consideration, he may withdraw in like manner, before the second or third verdict, is delivered into the hands of the clerk.

But one counsel of a side is allowed upon a motion, without special liberty from the court.

No interruption may be given to a judge while giving his opinion in court; upon any question submitted to the court for decision; by the parties or counsel of either side; but when the judge is through, if anything has been omitted, or misapprehended; upon application to the court liberty will be given to the party to rectify it.

No interruption may be given to the counsel, while arguing in his turn, by the other side; unless he misstates the evidence or the law, in that case, application is to be made to the court to have the mistake set right.

In trials, the party who is to prove the affirmative of an issue, goes forward in the introduction of his evidences; and the witnesses are to relate what they know, respecting it, then he that produced them hath right first to interrogate them; after he is through; the adverse party, is to cross-examine them; in doing of which the questions on both sides, are to be fairly put, and distinctly answered by the witness, without any interruption or suggestions, from either party.

Under the plea of *nonassumpsit*, to an action upon an express promise; it hath been adjudged, that payment cannot be given in evidence to defeat the action; although in an action upon an implied promise, it may. For payment admits an express promise, but extinguishes an implied one.

All motions in arrest are to be notified in court upon the verdict's being accepted and recorded, and reduced to writing and delivered to the adverse party, or lodged with the clerk, within twenty-four hours after the verdict is accepted, exclusive of Sabbath-day, when there are twenty-four hours, before the rising of the court; if there are not, it must be delivered in, before the court rises.

When judgment is arrested, for insufficiency of the declaration, no cost is allowed or taxed for either party.

When the judgment is arrested for the immateriality of the issue, a repleader is ordered if for misbehavior of the party, or for a defect or any misconduct, in any of the jurors, a trial by another jury is ordered.

Every issue joined to the court or jury, must be found affirmatively or negatively, in the terms of it; and it is not sufficient for them to say, that they find the issue for the plaintiff or defendant; nor that they find all the material facts to be true.

And where an immaterial issue is put to the court; they will find the facts in issue as above, and give judgment according to law upon the whole record.

Where upon the whole record it appears that judgment ought to be for the plaintiff, notwithstanding there is a verdict for the defendant, the court will give judgment according to the right of the cause.

During the session of the court, the records and judgments of that term, are in the power of the court; and any errors, misprisions, or mistakes of the clerk in the records, may be corrected, or amended by the court; but after the term is ended, the court have no power over them, to correct or amend; unless there are some written documents or minutes, to amend by.

It is not allowable for the officer who attends the jury, to be present in the room with the jury, while they are deliberating upon the cause under their consideration; nor to have any communication with them, or they with him; relative to the merits of the cause.

### Of New Trials.

By the granting of a new trial at large, in a cause, the force and effect of the judgment, is entirely removed.

The design of granting new trials, is the advancement of justice; and they are granted, upon new evidence, for mispleading, and for other reasonable cause.

The petitioner must set forth a state of the case, and of the former evidence, when the new trial is asked for on the ground of new evidence; also the new evidence, and who the witnesses are, and the reasons why he had not the evidence at the trial: although witnesses not named in the petition, may testify to those points which others named in the petition are adduced to prove; and it must appear, that the new evidence is material, legal, and not known of at the trial, or not attainable, by using due diligence, or that he lost the benefit of it, by some fault of others, which it was not in his power to have prevented.

When it is asked for, on the ground of mispleading, the petitioner must state the case, and show wherefore his plea was deficient; also must set forth his new plea, and that he can support it; for it is necessary, that it should appear, that his new plea, is sufficient in point of substance, that it is applicable to the case; and true in point of fact.

There are other causes for granting of new trials, as for a mistake in any of the judges, as to the question, or in the jury, as where they deliver to the court a verdict, by mistake, when a different verdict was agreed upon; or where they refer

the decision of the cause or the *quantum* of damages, to chance; or for other misconduct, whereby it appears that the cause has not been fairly and legally tried and decided: and there are many matters which might have been moved in arrest, had they been known of in season, which may be assigned as good reasons for a new trial.

A petition for a new trial may be exhibited to the court at the same term the cause was tried; and if the respondent agrees notice, and to go on to trial; the court will hear it, if not, it will be continued; that legal service may be made, for the next court.

In taking of depositions notice must be given to the attorney of the adverse party; if he lives within twenty miles of the place of caption, and is known to be such; although the adverse party lives more than twenty miles from the place of caption. If a deposition is taken on account of the sickness of a witness, and before the cause is tried he gets well, yet if when it is tried the witness is sick and unable to come to court the deposition will be admitted.

A writ of error must be commenced within three years of the time of rendering the judgment complained of. If the record produced on oyer is variant from the record set forth in the writ, the defendant may plead the variance, or that there is no such record. Upon which the plaintiff in error may suggest to the court that there is a diminution in the record sent up and pray the court to issue a *certiorari* to the clerk of the court below requiring him to certify the whole of the record. If upon inspection it is found that there is no such record the writ abates. If it is found that there is such record, the judgment is that the defendant answer over to the writ of error.

When the judgment complained of is reversed, the court give judgment that the plaintiff in error recover all he has suffered and lost by means of the erroneous judgment; but no

cost is allowed upon the writ of error, and the plaintiff in the original action, may enter and try his cause in the Superior Court, as though it came up by an appeal. If the judgment of the court upon the writ of error is that there is nothing erroneous in the judgment complained of, the defendant in error recovers his cost, and the court upon affirming the judgment, will give judgment for the interest by way of damages, during the time the execution was stayed by the writ of error.

The Supreme Court of Errors, upon a reversal of a judgment of this court, do not proceed to try or render any judgment in the original cause; but whenever it is proper and necessary, they remand the cause to the Superior Court for them to render the proper judgment; and in such case the parties are allowed to plead anew.

An *audita querela*, is a writ which is granted by the chief judge of the Superior Court, and by the chief judge of the respective County Courts, upon a complaint made by a debtor in execution, alleging some good cause wherefore he ought to be discharged from an execution, which he has had no day in court to plead or avail himself of; and praying to be liberated from the execution, and that the creditor may be cited before the court, to answer to his complaint, which he prays may be heard and he finally discharged; on granting of which good and sufficient bonds with surety are to be taken.

If the complaint is grounded upon any written evidence, it must be produced to the judge, if upon parol testimony, what their testimony will be, must be produced to the judge, upon the application, that he may see that the complaint is not groundless, before he grants so important a process to arrest the execution of the law; although it is a writ of right and in many cases absolutely necessary, for the purposes of justice.

OF CHANGING OR RENEWING BONDS GIVEN IN CAUSES.

Bonds given for the prosecution of an action, special bail given to the action for abiding final judgment, and bonds

given for the appeal of a cause; may be renewed or changed in this court, by taking others in lieu of them where the bondsman has failed, and for other reasonable cause.

### Proceedings in Chancery.

The jurisdiction of the courts of chancery, in this state, is much narrower than in other countries, owing to the statute which takes from them all causes in which adequate remedy may be had at law; and to the liberality of the courts of common law, who consider their institution to be for the purposes of doing justice; and have been and are extending the law remedies to almost every case, that justice requires, where they are not restricted by some positive statute or some settled principle of law.

Fraud, accident, and trust, are in the English law books said to be peculiar objects of chancery cognizance; but in this state there is adequate remedy at law, for most of the cases that arise from them.

Fraud renders void deeds, contracts, and judgments, equally at law as in chancery.

And where a deed or any obligation is lost or destroyed by accident, this being proved, the courts of law admit other evidence in proof of the instrument lost, and to supply its place.

And in most cases of trust, the trustee is compellable in an action at law, to account and pay over the interest to the person, for whom he holds in trust.

And the action of *indebitatus assumpsit*, general or special, which rests upon the broad basis of justice and equity, furnishes a remedy at law, in all cases where justice requires compensation to be made on the ground of an implied promise, where there is no express parol or written contract.

As where one man has by almost any means, got into his possession money or other property, except received as bailiff and receiver, to account for as such; which in equity and good conscience he ought not to hold and detain, without making compensation for.

In short it seems to be the prevailing disposition of the courts of law, to make the law remedies coextensive with the rights of the citizens and the requirements of justice; where they are not restricted by some positive laws; and to abolish the odious distinction that hath been held up between courts of law, and courts of equity; as though courts of law were not courts of justice. Believing that, *est boni judicis, ampliare justiciam.*

The jurisdiction of the chancery courts is confined principally, to compelling a specific performance of agreements; to granting relief against errors and defects in deeds, and other instruments, which by mistake or fraud are drawn contrary to what the agreement of the parties was, they should be; by ordering the mistake to be set right in the deed or instrument, or by obliging the party to do, what by the original contract he agreed to do.

To compelling those, who have got the legal title to an estate, without any equitable right to have or hold it; to resign it to him who hath right.

To decreeing the redemption and foreclosures of mortgaged estates — to granting relief in certain cases against the lapse of time.

To compelling a discovery on oath from a party interested, where the evidence of certain facts rests in his private knowledge, and cannot be otherways proved.

To granting of injunctions in certain cases.

To decreeing an offset to be made of mutual liquidated debts—and to taking depositions *in perpetuam memoriam rei.*

Petitions in chancery must describe the parties with clearness and certainty; must contain a case, which entitles the petitioner to relief in equity, against the petitionee, and for which he hath no adequate remedy at law; and the relief prayed for must be proper for a court of chancery to grant in such case. Yet if there is a prayer for relief generally, and the court shall judge relief ought to be granted, a particular request for some specific thing, which would be improper to be granted; will not vitiate the petition.

In a petition for a discovery, it is necessary that the petition contain a particular state of the facts, of which the discovery is sought. Also that the petitioner hath no other evidence; and this petition may be brought for a discovery only, or for both a discovery and relief.

In a petition to take depositions to perpetuate testimony, it is necessary that it should contain a state of the case, in which the petitioner wants to improve the evidence; also the reasons for the application; and the adverse party interested in the testimony is to be cited, that he may have a day in court to object to the measure, and to be present to cross-examine the witnesses.

In a petition for an offset, it must appear that the debt prayed to be offset is liquidated and about which there is no dispute in the law, and that the party against whom the offset is prayed is bankrupt, or resides in a foreign jurisdiction, and that it is necessary in order to prevent a failure of justice.

A bill of revivor lies where a petition is abated by the death of either of the parties, or for other cause, to revive the same; and must state the former petition, the cause of its abating, and that it is necessary for the purposes of justice it

should be revived; it must also set forth the proper party in whose favor, or against whom it ought to be revived.

A bill of review is in nature of a petition for a new trial in an action at law, and is brought on the ground of new discovered evidence, or of the party's having mistaken his defense, or for other reasonable cause. But for error in the proceedings, record or decree, apparent upon the record, files or exhibits; a writ of error is the proper remedy.

The petition of review must state the case, the cause of his failing to recover, and the new discovered evidence, if it is asked for on that ground. If it is asked for on the ground of having mistaken his defense, it must set forth what that was, and what the defense is, which he ought to have made, and that he is able to support it; as in a petition for a new trial at law.

A supplemental bill is brought, to supply certain defects in the original petition, to enable the court to do more complete and ample justice: as

Where the additions or new allegations are such as to make it in a sense a new, or essentially different thing, of which the law requires the adverse party should have twelve days' notice; and doth not come within the Statute of Amendments; the bill must set forth the former petition, the points wherein it is defective, and the allegations which are necessary to be supplied or added.

A cross-bill, as it is called, is preferred by one or more of the defendants, in answer to an original petition which is pending against them, for the purpose of obtaining a discovery from the plaintiff in the original petition, of some matters of which the defendant hath no other evidence, and to introduce into the case certain matters and things which could not be properly disclosed by an answer only, in order to enable the court to do more perfect justice in the cause amongst all the parties concerned.

Pleas to suits in chancery, are either to the jurisdiction of the court, the persons of the plaintiff or defendant, or to some defect in the petition, citation, or service; or the want of proper parties; or some matter in bar of the suit.

A demurrer to a petition admits all the facts which are well and sufficiently alleged.

A demurrer to a petition will hold, where it appears by the petitioner's own showing that he has adequate remedy at law — or where the case stated in the petition doth not entitle him to relief in equity — or not the relief prayed for -- or not to relief from the party of whom it is sought — or where matters of a different nature are joined, or where the bill is deficient and will not answer the purposes of justice.

A demurrer may hold as to some parts of a petition and be overruled as to the other parts.

If a petition is judged to be insufficient upon demurrer, it is dismissed, but it may be amended upon payment of cost at the discretion of the court, agreeable to the statute.

If a demurrer to a petition is overruled, the judgment is interlocutory, and the defendant may contest the facts in the petition, plead in bar, or make answer as the case may require.

A defendant may demur, plead and make answer to different parts of the same petition, at one and the same time.

When a plea or answer is demurred to, if the demurrer holds, and the plea or answer is judged to be insufficient, the petition is not granted of course, but the court will hear the evidence of the facts alleged in the petition, unless they are confessed by the defendant's answer.

If a demurrer to a plea or answer is overruled and the plea or answer is judged to be sufficient, the petition is dismissed of course.

If a defendant relies in his defense, upon the plaintiff's being unable to make out his case in proof — he need make no other answer, than that the facts alleged in the petition are not true.

If certain facts are alleged in a petition that are not true, and without which a demurrer to the petition would hold; the defendant may deny those facts and demur to the rest of the petition.

Where certain facts are omitted in a petition, which would vary the case made by the plaintiff, and show that he had no right to recover, the defendant may state them in his answer, and deny the plaintiff's case to be, as stated in the petition. To this the plaintiff may reply by demurring, or by denying the facts contained in the answer. And in chancery the pleadings are seldom carried further than to a replication.

Answers to petitions are put in without oath, except where a discovery is prayed for.

The rule is the same in chancery, as at law, with respect to amendments, also with respect to the admission of evidence, except in cases where a discovery is prayed for.

The same rules are adopted in chancery, as at law, in the construction of wills, deeds and other contracts and agreements.

If, upon a hearing on the merits, the plaintiff makes out his case in proof, the court will grant the petition, and find the facts on which the decree, that shall be passed, is founded.

If the plaintiff fails of supporting his case upon a hearing, the petition is negatived, usually with cost.

Decrees in chancery operate upon the person, or thing, or upon both. If money is decreed to be paid an execution issues to collect it. Where deeds are decreed to be delivered up or land to be released, the decree is enforced by a penalty.

An injunction is by the authority of the court; and an infraction of it not only incurs a forfeiture of the penalty annexed to the breach of it, but is a contempt of the authority of the court.

A decree operates upon the thing, when a deed or other instrument is decreed to be void — or where mutual debts are discharged by an offset.

When a decree with a penalty is disobeyed, a petition in nature of a *scire facias*, lies before the court to enforce it, or recover the penalty; upon which the defendant may tender a compliance with the decree, and make application to the court, that it may be accepted, with reasonable damages and cost for the delay, in exoneration of the penalty; or may ask to have the time lengthened out, for performing the decree.

Where a discovery is prayed for, under an idea that the plaintiff hath no evidence but what rests in the private knowledge of the defendant, the plaintiff may afterwards waive calling upon the defendant to disclose on oath, and resort to other evidence to prove his case, provided he gives reasonable notice thereof to the defendant, so that he be laid under no disadvantage in making his defense.

When the defendant is compelled by the plaintiff to make a discovery on oath, touching any matter alleged in the petition; other evidence may not be introduced by the plaintiff to contradict or impeach his testimony. Yet if the defendant swears falsely, he will be liable for the perjury, as in other cases.

The objections to compelling a discovery may arise from the plaintiff's want of right or title to it. 2dly. From the

impropriety of compelling a discovery of the thing asked for. And 3dly. From the situation and circumstances of the defendant, as it may tend to accuse himself of a crime, or expose him to a penalty.

An injunction may be granted to stay proceedings at law where the question of right between the parties is pending in chancery, and must ultimately be decided there.

It may be granted to prevent waste being committed upon an estate; until the title, which is in dispute in the law, is decided.

It may be granted against prosecuting claims which are manifestly unjust and ought not to be recovered.

It may be granted to put a stop to endless lawsuits and vexation; where the right has been fully and fairly investigated and decided at law.

A commission will be granted by the court sitting in the county where the petition is pending, to take depositions in foreign parts, or to receive the answer of the defendant on oath, where a discovery is prayed for; upon the application of the parties or either of them; when it shall be made to appear to the court that it is reasonable and necessary, for the ends and purposes of justice, and that the situation and circumstances of the defendant are such, that he ought not to be required, to give personal attendance in court.

Protections to suitors and witnesses in causes depending before the court, are granted by both the courts of law and chancery, when and wherever they are necessary for the expedition of justice.

And writs of attachment, and of *duces tecum*, are issued to compel parties or witnesses to appear before the court, who refuse to obey an ordinary subpoena, and to bring with them deeds and other exhibits or instruments in writing, which they suppress and withhold, that are necessary to a thorough investigation of a cause, whenever justice requires it to be done.

Writs of *habeas corpus* are issued by the Superior Court upon complaint made, where a person is imprisoned and held in an illegal manner, to bring the party and the cause before the court, to be heard and examined, that speedy justice may be done.

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Administration *de bonis non*, is to be granted, where there are debts unsatisfied, notwithstanding the estate is all distributed. Brattle, administrator, v. Converse, 174.

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A promise to see another forthcoming upon an execution, or to pay the debt, is within the Statute of Frauds and Perjuries. Thomas v. Welles, 57.

An agreement by parol to convey land, in consideration of a promise to pay for them — is within the Statute of Frauds and Perjuries. Tainter v. Brockway, 59.

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A plaintiff may admit his writ to abate, and amend on payment of cost. Ely v. Stow, 115.

Records of a court are not amendable after the term is ended. Foot et al. v. Cady, 173.

A petition may be amended after it is abated for want of necessary averments. Rogers et al., executors, v. Moor, a coexecutor, 472.

A writ of error may be amended after a special demurrer, by inserting the final judgment on payment of cost. Dunham v. Braiman, 551.

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No appeal lies from a return of commissioners, on an insolvent estate, in favor of a creditor, merely because his claim is disallowed. Phelps v. Edwards, administrator, 96.

An appeal lies in favor of the defendant from a judgment rendered upon *nihil dicit*, Bugbee v. Abbot, 109.

Although an arbitration note is for more than £20, yet if neither the matters submitted, nor the award, amount to £20, it is not appealable. Steavens v. Bass, 127.

No appeal lies in an action against an officer for an escape upon an execution, where a receipt was taken. Benedict v. Hoit, 153.

In an appeal from probate respecting real estate; if the appellant dies, the executor cannot enter to prosecute. Perry v. Perry, 203.

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Where neither the matters submitted nor the award exceed £20, the cause is not appealable; although the arbitration note on which the action is brought, is more. Gates v. Jones, 238.

A creditor may appeal from the acceptance of the report of commissioners for any irregularity in their appointment or return. Edwards, administrator, v. Administrator of Botsford, 244.

An appeal lies in favor of creditors or heirs, from a decree of probate, accepting a report of commissioners, as it respects the claims allowed the administrator. Staniford et al. v. Hide, 263.

If the value of the thing in dispute is laid to be less than £20, the appeal will be dismissed. Lord v. Mervin, 276.

An agreement to accept land in satisfaction of a note for money, doth not make the action on the note appealable. Wilford v. Kimberly, 297.

A party may not appeal from a judgment altogether in his favor. Holton v. Ruggles, 318.

No duty is required to be paid on an appeal from probate. An appeal to the next Superior Court good. Rogers v. Executors of Rogers, 476.

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A cause not appealable dismissed *ex-officio* by the court. Strong v. Meacham, 525.

A cause not appealable dismissed by the court *ex-officio*. Chapman v. Griffin, 525.

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If it appears that an offense was not prosecuted until barred by the Statute of Limitations, it is good cause of arrest. State v. Gibbs, 171.

Motion in arrest of judgment must be answered directly. Worthington v. Dewit, 182.

It is no cause of arrest that the jury have found a verdict without sufficient evidence. Carpenter v. Child et al., 220.

The court will not arrest a verdict on motion of a town because some of the jury were related to the inhabitants of the town. Carew et al. v. Howard, 323.

It is no cause of arrest after a general verdict in an action of slander, that some of the words laid in the declaration are not actionable. Lewis v. Niles, 346.

Same case, 433.

Where two issues are joined to different parts of the same declaration, and the verdict is arrested as to one, it doth not affect the verdict as to the other. Austin v. Fitch, sheriff, 288.

A juryman having an interest in the question tried; good cause of arrest. Talmadge v. Northrop, 454.

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If the sheriff recovers a judgment against a bondsman for an escape of a debtor; and the creditor is barred of his remedy against the sheriff, by the statute, the bondsman may have an *audita querela*. Hall v. Fitch, sheriff, 151.

AUDITORS.

Auditors may be inquired of, in respect to the principles upon which they made out the sum found by them. State v. Worthington, 137.

Many matters, which would be proper in a petition for a new trial, are improper to be inquired after upon a remonstrance. Williams v. Welles, 261.

If auditors allow articles not within their commission their return will be set aside. Howard v. Lyon, 268.

If they make a mistake upon their own principles, they may be inquired of. Spalding v. Dunlap, 413.

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Same point adjudged in case of Palmer v. Corben, 271.

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A person may not except against part of an award, which respects other parties, and not himself. Netleton, administrator, v. Buckingham, 149.

The court will not set aside an award, because the arbitrators have misjudged as to the law, if the point is doubtful. Hall v. Merriman, 197.

If it appears from the declaration, in an action upon an award, that the arbitrators went upon a mistake in point of law, it will be bad upon a demurrer. Town of Watertown v. Town of Waterbury, 212.

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The property of goods is vested in the bailee, upon the owner's recovering pay of him for them. Brewster v. Town of Norwich, 146.

BAIL AND BONDS FOR PROSECUTION.

A bond given for the plaintiff for prosecution, is not discharged, by imprisoning the plaintiff on the execution for the cost. County Treasurer v. Bissel, 85.

Special bail exonerated, by a judgment in favor of his principal, although the judgment is afterwards reversed for error, and judgment rendered against him. Butler v. Bissel, 102.

A debtor in execution by paying the original creditor, doth not discharge a judgment recovered by the officer against the bail, as to the cost and his fees. Seymour et al., administrators, v. Hine, 254.

A bond for the prosecution of an action, is discharged by the death of the plaintiff before any judgment entered against him. Williams v. Francis, 259.

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An action cannot be sustained in the bankrupt's name, after an assignment of his property, for a debt contracted before. Elderkin v. Elderkin, 139.

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One copy of a petition left at the usual place of abode of the husband and wife, good service for both. Lord v. Strong et ux., 475.

A bondsman for a plaintiff upon the appeal of his cause, is liable for the cost. Stilman v. Hosmer, administratrix, 314.

A bond for the prosecution of an action not within the Statute of Limitation respecting bail. Fitch v. Burr, 365.

The sheriff's bail is discharged if the body of the principal is taken by the execution. Johnson, sheriff, v. Smith, 373.

A bond taken upon a criminal prosecution, by a justice, that the party shall appear, answer and abide judgment is a good bond. County Treasurer v. Burr et al., 392.

Sheriff's bail must be prosecuted within twelve months after the judgment. Howard v. Miller, 428.

The bail is exonerated by a judgment in favor of the principal, although a new trial is afterwards granted. Ainsworth v. Peabody, 469.

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It is requisite in order to recover maintenance for a bastard child, that the mother charge it upon the man accused of being the father in the time of her travail. Hitchcock v. Grant, 107.

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Same point adjudged in case of Fuller v. Hancock, 238.

Where the condition of a bond is to attend court and give evidence in a certain cause — if he offers to do it, and the obligee refuses to support him, he has fulfilled the condition. Bellows v. Smith, 277.

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An action on book lies to recover money paid on a note, which has not been applied. Brown v. Talcot, 85.

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Where a security by mistake or accident is rendered void at law — chancery will decree a payment of the debt. Little v. Fowler, administrator, 94.

Chancery will relieve against accident and aid a title defective at law. Gay v. Adams et al., 105.

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A party cannot be a witness in his own favor in chancery. Chancery will not relieve against an express statute — will decree an offset of liquidated debts. Webb v. Fitch et al., administrators, 177.

A judgment in chancery upon a demurrer to a petition or plea — if it is in support of the petition or against the plea is not final. Warner et al. v. Tomlinson et al., 201.

Chancery will not sustain a petition where the petitioner has adequate remedy at law. A decree in chancery must find the facts. Samson v. Hunt, 207.

A court of chancery will decree an offset against an administrator of an insolvent estate on the ground of fraud. Rose v. Clark et ux., administrators, 229.

A decree without finding facts to warrant it is erroneous. Peters v. Rosseter, 273.

Where a person hath right to money for which another hath an execution — chancery will decree it to be paid to him that hath right and lay an injunction upon the other. Worthington, administrator, v. Broom et al., 279.

Where a person is barred of his remedy at law by inevitable accident, chancery will grant relief. Jones et al. v. Woodhull, administrator, 298.

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Same point, Crane v. Hanks, 468.

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A court of chancery after an award of arbitrators will relieve against a fraud, which defeats the party of all benefit from it. Hillyard v. Nichols, 360.

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Same point. Fitch v. Broomfield, 467.

Will administer complete redress to the parties. Beardsly et al. v. Hall et al., 366.

Chancery will correct the mistakes of arbitrators in an award without setting it aside, where it can be done. Gregory v. Seamons et al., 367.

Chancery will not compel the promisor in a note to pay the money to the assignee, unless the promisee is insolvent. Pitkin v. Welles, 390.

Chancery will relieve against mistakes and accidents; and will decree against the heirs specifically, in favor of an assignee, what their ancestor bound himself to perform. Matson v. Parkhurst et al., 404.

Chancery will relieve against the fraud of a grantee, who refused to give a defeasance, after he had obtained the deed, contrary to his agreement. Peck v. Baldwin, 455.

A decree in chancery must find the facts which warrant it. Bacon v. Childs et al., 466.

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Chancery will dismiss a petition where the petitioner has adequate remedy at law. Beardsley et al. v. Curtice, 499.

A decree must find the facts which warrant it. Samson v. Hunt, 521.

Will decree a forclosure of the equity of redemption, where the debt and charges equal the value of the estate. Pettibone v. Administrators of Roberts, 527.

After a mortgagor has failed of performing the condition of the mortgage his remedy for redeeming his land is in chancery. Boles v. Calkins, 553.

CITY COURTS.

It is necessary in order to give to the City Court, jurisdiction of a cause, that it appear, that one of the parties was residing in the city when the cause of action arose. Buel v. Tabrick et al., 150.

Same point. Nichols v. Shaw, 315.

It must appear that the cause of action arose within the city. Strong v. Avery, 259.

The cause of action must arise within the city to give jurisdiction to the court. Cornwell v. Hosmer, 282.

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Same point adjudged, Williams, administratrix, v. Executors of Thomas Darling, 356.

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Expenses incurred subsequent to the death of the intestate not subject to the consideration of commissioners. Greenleaf v. Sabin, administrator, 468.

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Forbearance a good consideration of a promise. Tuttle v. Bigelow, 108.

An agreement to make an offset, which is compellable only in chancery, is a good consideration of an agreement to pay the interest of a debt. Ponderson v. Fanning, 193.

The public service, in the army during the war, is a good consideration of a grant made by a town, of a sum in addition to the public pay to soldiers, who had enlisted as well as to those who should. Hitchcock v. Town of Litchfield, 206.

A consideration expressed in a deed, not conclusive evidence of the amount or payment of the real consideration. Hannah v. Wadsworth, 458.

Same point in Cone v. Tracy, 479.

CONSTABLES.

A constable is an annual officer, and is chosen and sworn, and again rechosen the next year, he may officiate before he is sworn again. Kelsy v. Wright et ux., 83.

A constable may not be chosen after the month of December, except in case of death or removal. Beacher v. Hart, 135.

COPYRIGHT.

A person printing copies of a book for another and upon the other's copyright, is in consideration of law, the same as though printed by the other. Hudson et al. v. Patten, 133.

CORPORATION.

Deacons of a church a corporation and may take by succession. Buckingham et al. v. Northop, 53.

COSTS.

Where the effect of the suit is, that the plaintiff recovers the thing demanded, he shall have full cost, although the jury find, less than forty shillings damages. Brick et al., executors, v. Reed, 136.

Upon the reversal of a judgment of the Court of Probate for the mistake or error of the judge, no cost is allowed. Sloan's appeal from probate, 151.

Cost taxed against a minor in an appeal from probate. Davidson v. Davidson, 325.

Full cost taxed on the final issue of a cause upon a repleader. Johnson, sheriff, v. Smith, 373.

In trover against two if one of the defendants is acquitted he recovers his cost and half the court and jury fees, that was paid by the defendants. Apple v. Russel et al., 486.

Where two persons are joined in a *scire facias* that might not be, and are acquitted each recovers his cost. Steward v. Brewster et al., 550.

COUNTERFEITING BILLS, ETC.

Uttering counterfeit bills of the state of New York, the currency of which, is prohibited, not an offense within the Statute against Passing Counterfeit Bills. Rex v. Humphrey, 53.

In an action upon the statute for putting off, to the plaintiff, a counterfeit public security, the plaintiff may be permitted to testify only to the identity of the security, and to the person of whom he received it. Bradley v. Couch, 361.

CREDITORS.

A creditor is barred of his claim by the disallowance of commissioners. Ponderson v. Avery, 103.

Same point adjudged in the case of, Canon v. Abbot, administrator, 251.

A creditor may not be a commissioner on an insolvent estate. Barker v. Wales, 265.

Creditors or their representatives who are out of the state at the time when the order of probate is published limiting the time for exhibiting their claims, are not barred thereby. Williams, administrator, v. Belden, administratrix, 464.

DEBTORS.

The estate, of a poor imprisoned debtor, who has taken the oath and left the gaol for want of subsistence being furnished, will be liable for the debt. Elliot v. Mix, 58.

The public and not the commissary is debtor for purchases made by him for the use of the public. Osgood v. Grosvenor, 89.

DECLARATION.

If the plaintiff declares upon a bond and the conditions, he must assign a breach of the condition in direct terms. Fitch v. Lothrop et al., 88.

In an action by an officer against a receiver of goods taken by execution, it is not necessary to aver in the declaration, that the judgment is unsatisfied. Hartshorn v. Halsey, 92.

Same point adjudged in the case of, Maples et al. v. Peck, 140.

In a declaration upon a probate bond it is not necessary to set forth the condition. Woodbridge v. Grant, 173.

In a declaration against a society's committee for inserting the plaintiff's name in a tax bill, it must appear, that the tax was laid for a purpose, which he was exempted from paying. Tillotson et al. v. Bishop, 228.

A declaration which charges the defendant with false imprisonment and with forging the justice's name to the writ by which he was imprisoned, is a good declaration. Moulton v. Burbanks, 264.

Surplusage will not vitiate a declaration otherwise substantially good. Holebrook v. Judd, 456.

DEEDS.

The record of a deed shall relate to the time when received, unless delayed by some fault or negligence of the grantee. Hartmyer v. Gates, 61.

If a grantee is the cause of a deed's not being recorded, the record shall not relate back to the time, of its being received, to the prejudice of a third person. Ray v. Bush, 81.

A deed given of land, of which the grantor was disseized, is to every purpose null and void. Isham, administrator, v. Avery, 100.

A deed of land, of which the grantor is disseized, is void. Holebrook v. Lucas, 199.

A deed given by a constable as collector, of his own land, supposing it to be another man's is good to convey the land to the purchaser. Brown v. Wheeler, 236.

A deed recorded in a reasonable time, under the circumstances, will hold against an attachment antecedently made. Moor v. Watson, 388.

A deed given of land of which the grantor is disseized, is void. Freeman v. Thompson. 402.

Deeds of administrators are not within the statute made to prevent frauds, etc. in bargains and sales of land, etc. Barney v. Cutler et al., 489.

A copy of a deed from the record may be given in evidence, in an action upon the covenant of seisin. Sherwood v. Hubbel, 498.

A delay in recording a deed after it is received for record, will not prejudice the grantee in his title, if it was owing to no fault or negligence in him. Franklin v. Cannon, 500.

DEMAND.

Upon an obligation to deliver certain specific articles, on demand, a special demand is necessary, to entitle to damages. Smith v. Leavensworth, 209.

A demand must be made of money collected by an officer upon an execution before an action of *indebitatus assumpsit* will lie against him for it. Church v. Clark, 306.

DEMURRER TO EVIDENCE.

Parol evidence may be demurred to by agreement. Brewster v. Dana, 266.

DEPOSITIONS.

Depositions taken out of the state within twenty miles of the adverse party, notice must be given. Moses et ux. v. Gunn, et al., 307.

Depositions taken in the state within twenty miles of the known attorney of the adverse party, he must be notified, although the party himself, lives more than twenty miles off. Williams v. Fitch, sheriff, 316.

Same point in case of, The Town of Killingsworth v. The Town of Goshen, 480.

Same point in case of, Hillyard v. Nichols, 493.

DEPUTY SHERIFF.

A deputy sheriff may not appear as an attorney in a cause for another. Hathaway v. Gillet, 258.

DEVISE.

A devise of the use of a grist-mill, to three during their natural lives, and the fee to the heirs of the longest liver of them — on the death of either, his part goes to his heirs, until all three are dead. Bulkley v. Bulkley et al., 78.

A devise to a man and the heirs male of his body lawfully begotten, is an estate tail. Manwarring v. Tabor, 79.

Same point adjudged in the case of, Allin et ux. v. Bunce, 96.

Where a devisee is charged with the maintenance of the devisor's widow, in consequence of a devise of land to him, it creates a lien upon the estate. Dodge v. Dodge et al., 233.

A devise to a man and to the male heir of his body lawfully begotten in fee tail, vests a right in all his sons to take and to hold upon his decease, in the same manner and proportion as they would inherit their father's estate. Larabee v. Larabee, 555.

DISCHARGE.

A receipt given to one of the co-obligors in full of his part to pay, doth not discharge the obligation. Andrus v. Andrus, 72.

A receipt in full of all demands upon bond, doth not discharge a bond conditioned to pay a sum annually, during the life of the obligee. Smith v. Smith, 235.

A discharge from a woman of all demands for maintenance of a bastard child, of which she is pregnant, will debar her of any remedy, if she has more than one child. Spalding v. Felch, 319.

A discharge of all debts, dues, and demands, discharges a special promise to pay the interest of a note, which is assigned. Howel v. Seaman, 383.

In an action upon the covenant of seisin in a deed, to a man and his assigns a discharge from the grantee will not purge the grantor of an interest, where the grantee has conveyed any part of the premises to other people. Sherwood v. Hubbel, 498.

A discharge of one joint debtor by the creditor is a discharge of both. Abel, sheriff, v. Forgue, 502.

DISSENTERS.

Dissenters from a church or society are liable to be taxed for debts incurred before they went off. Hosford et al. v. Lord, 325.

Same point adjudged in case of, Lord v. Marvin et al., 330.

DIVORCE.

Notice is to be given of a petition for divorce as in other cases where it can be done. Rebecca Hotchkiss's petition, 355.

DOWER.

Dower is assignable only out of the real estate of which the husband died seized. Deforest's appeal from probate, 50.

The widow's right of dower is paramount to the right of heirs or their creditors. Crocker v. Fox, 227.

A sum in gross ordered to the wife by way of dower, is recoverable out of the husband's estate. Smith, administrator, v. Smith, 349.

EJECTMENT.

If the defendant acquires title to the demanded premises pending the suit, the plaintiff must fail. Munsel v. Sanford, 257.

In an action of ejectment the land must be demanded. Porter et al. v. Warner, 438.

ERROR.

A writ of error is barred unless commenced within three years from the day of rendering the judgment. Allin v. Cook, 54.

Writ of error lies against a judgment upon the Statute against Forcible Entry and Detainer. Stuart v. Pierce, 75.

Upon a reversal for error, the plaintiff must enter his action at the same court and not after. Marsh v. Deming, 85.

Upon the plea of *nul tiel record;* if the copies differ, the court will order the original record to be brought up. Allin v. Hiscock, 88.

Judgment reversed as to part of the cost only. Dixon v. Pierce, 138.

Error will not lie against an interlocutory order or sentence, until final judgment is rendered. Carpenter v. Childs, 181.

Must be brought in the county where the judgment complained of was rendered. Curtice v. Mason, 259.

If errors in fact and errors in law are joined, the errors in fact may be erased. Lewis v. Lawson, 262.

Error doth not lie against an interlocutory judgment until final judgment is rendered. Ray v. Fitch, 290.

ESCAPE.

An officer is not liable for an escape on mean process, if he takes bail apparently good at the time. Northum v. Phelps, 54.

A gaoler is not liable for an escape, for releasing a prisoner by order of the assembly. Fitch, sheriff, v. Badger, 72.

The escaping of a prisoner who hath the liberty of the yard upon bonds, is a negligent, escape. Jones v. Abbe, sheriff, 106.

A prisoner upon execution, who makes his escape from the officer, may be retaken at any place. Howard v. Lyon, 107.

A prisoner escaping who hath the liberties of the yard on bonds is a negligent escape. Abel, sheriff, v. Bennet, 127.

A prisoner must remain in gaol a reasonable time after the money left for his support is expended, or, it will be an escape. Fitch, sheriff, v. Cook et al., 285.

Same point. Abel, sheriff, v. Godfrey et al., 494.

In an action of escape against the sheriff, he may avail himself of the court's not having jurisdiction, that rendered the judgment, Austin v. Fitch, sheriff, 288.

An officer may retake and hold his prisoner who has escaped from him upon mean process notwithstanding he has returned the writ. Strong v. Ives, 388.

ESTOPPEL.

A lessee, in an action of ejectment, brought by the lessor for the letten premises is estopped saying that the plaintiff hath no title. Holmes v. Kennedy, 77.

A person for the payment of whose taxes certain lands were taken and sold as his — is estopped to say in an action brought against him for the land, that the plaintiff hath no title, because he had none. Town of Norwich v. Congden, 222.

EVIDENCE.

In an action of account for money, the person who delivered it may be a witness to prove it. Hyde v. Park, 55.

Under the plea of full payment accord and satisfaction may not be given in evidence. Kisham et al., executors v. Nickols, 75.

The deposition of a mother who had a child so sick that she could not leave it, admitted as coming within the reason of the statute. Avery v. Woodruff, 76.

Where a witness is sent away by the instigation of a prisoner, what he had testified before the grand jury was allowed to be given in evidence to the petit jury. Rex v. Barber, 76.

A witness interested in the question of fact on trial, may not be admitted. Hall v. Dwight, 76.

In an action brought by the daughter, for giving her a dose, the mother was allowed to relate what the daughter told her the morning after. Goodwin v. Harrison, 80.

Parol evidence admitted to prove that the grantee gave orders not to have his deed recorded. Ray v. Bush, 81.

The deposition of a witness, who was dead, taken and improved before the general assembly on a petition, between the same parties, relating to the same point now in question, was admitted. Ib.

If there is no evidence, against some of the defendants, in a criminal prosecution, their names may be erased from the complaint, and they may be used as witnesses. State v. Shaw et al., 134.

Accord and satisfaction cannot be given in evidence under the plea of full payment. Church v. Rhodes, 141.

In a prosecution for passing counterfeit money — no evidence of the money's being counterfeit may be received, until the money is produced. State v. Orsborn, 152.

The deposition of the mother of a bastard child, taken *ex parte*, and before any suit was commenced, cannot be read as evidence although the mother be dead. M'Donald v. Hobby et al., 154.

Parol evidence not admissible to explain the words in a note. Alsop v. Goodwin, 196.

A receipt, which has been disallowed by the jury, as evidence of payment on a note — may be given in evidence in an action of *assumpsit* for the money. Mervin v. Potter, 201.

Parol evidence admitted to explain a blank indorsement. Smith, Executor v. Barber, 207.

The inhabitants of a town may be admitted as witnesses in certain cases, notwithstanding the town is interested. Ib.

An attorney who transacted the business for the plaintiff was admitted a witness. Smith v. Huntington, 226.

A deposition drawn by the agent for the plaintiff was rejected. Ib.

If a witness is discharged of his interest and the party is unable to produce the discharge — parol evidence admitted to prove it. Jewet v. Worthington, 226.

In an action of ejectment by a purchaser under an administrator, against an heir — the heir may not give in evidence, that the debts allowed by the court of probate were not just. Brewster v. Denison, 231.

In an action of ejectment the defendant may give his title in evidence, although those under whom he claims have failed of recovering in an action between other parties. Isham v. Townsend, 232.

A person may be a witness in a criminal prosecution, notwithstanding he will be entitled to a premium; unless there are other circumstances which concur to exclude him. State v. Bennet, 249.

Evidence of parol conditions, to a deed delivered to the party not admissible. Skinner v. Hendrick, 253.

A person interested in the question not admissible as a witness. Bacon v. Minor, 258.

A deposition, drawn up by the party and copied by a third person not admitted. Griswold v. Griswold, 259.

The doings of freeholders not admissible as evidence in the trial of title to lands. Humphrey v. Pison, 259.

Same point. Austin v. Hanchet, 314.

Parol evidence not admitted to explain a writing. Herd v. Bissel, 260.

A person interested in the question not admissible as a witness. Merriman v. Way, 283.

Same point. Pride v. Peters, 331.

Depositions admitted in a *quit am* action.— Notice must be given when taken out of the state, within twenty miles of the adverse party. Moses et ux. v. Gunn et al., 307.

The person in whose name a forged writing is, cannot be a witness in a prosecution for the forgery. State v. Brunson, 307.

The person to whom a forged writing is passed, may be a witness, and the handwriting of the person in whose name the forgery is, may be given in evidence. State v. Nettleton, 308.

In an action for a private assault the general character of the defendant not allowed to be given in evidence. Thompson v. Church, 312.

Length of time with other circumstances, presumptive evidence of payment. Pitkin et al., administrators, v. Kent, executor, 312.

Parol evidence not admissible to prove the contents of a libel. Aspenwall v. Whitemore, 408.

In an action of account by an administrator, the examination of the defendant on oath, touching the concealment of the deceased's goods, may be given in evidence, but the whole must be taken together. Benedict, administrator, v. Nickols, 434.

A witness interested in the question not admitted. Talmadge v. Northrop, 454.

In an action for breaking and entering the plaintiff's house and begetting his daughter with child — the daughter may be a witness. Mott v. Goddard, 472.

On an objection to a witness, parol evidence was received to prove that he was an infidel. Bow v. Parsons, sheriff, 480.

On an information for adultery — the husband of the woman with whom the crime was committed cannot be a witness. State v. Gardner, 485.

What one co-obligor has said who is not sued may not be given in evidence against the other. Abel, sheriff, v. Fergue, 502.

The plaintiff admitted to be a witness in an action of trespass, where his depositions were excluded. Tyler v. Scovel, 523.

In an action of trespass, brought by an officer — he may give in evidence that he was an officer, and had a lawful writ of execution, although not expressly averred in the declaration. Cone v. Bull, 527.

What a defendant had confessed, in a public prosecution against him, may be given in evidence in an action of assault and battery for the same facts. Eno v. Brown, 528.

The person in whose name the forgery is, may not be a witness. State v. Blodget, 534.

The forged writing must be produced. Ib.

A witness may be admitted to swear against his interest. Cobb v. Baldwin, 534.

EXECUTION.

An execution from the Superior or County Court, which is made returnable according to law, is returnable to the next court which hath sixty days from the date of it. Worthington v. Hollister, 101.

It is no objection against the levy of an execution, that it was prayed out sooner than it was agreed to have been. Cheesborough v. Clark et al., 141.

A tenant may be an appraiser of land taken by execution, if agreed to. Ib.

By next assistant or justice, in the statute authorized to appoint appraisers of land, is not meant strictly the nearest, but some one of the town; and if there are none such, the next living out of the town. Ib.

Taking out an execution upon a judgment given by default, against a person out of the state without giving bond as the law requires, is error which may be taken advantage of only by the defendant, and not by his creditors. Marcy v. Russ, 176.

Payment of an execution to the officer, will discharge the debtor, although it was prayed out after the death of the creditor. Worthington, administrator, v. Hosmer, 192.

The levy of an execution may be good although it doth not appear by the return, that the officer made a demand of the debtor, before he levied it. Beach v. Camp, 241.

If an execution is indorsed satisfied by mistake or accident, the creditor's remedy is by motion or *scire facias* to the court for an *alias* execution. Langdon v. Langdon, 453.

An execution not recorded in the office of the clerk, from whence it issued, not evidence of title. Barney v. Cutler et al., 489.

An execution levied on land, is no evidence of title, until recorded in the office of clerk of the court from whence it issued. Tapliff v. Davis, 556.

EXECUTOR.

Intermeddling with the lands of a deceased person, or his goods which are held by a conveyance from the deceased, although it be fraudulent, doth not make a man an executor in his own wrong. King v. Lyman, executor *de son tort*, 104.

Taking of administration will not purge the wrong of an executor *de son tort*. Green v. Dewit, executor *de son tort*, 183.

An executor may be a witness to a will. Hawley v. Brown, 494.

An executor hath no right to lands unless wanted to pay debts, or to answer some purpose expressed in the will. Hubbel, executor of H. Winegar, v. Prat, 518.

FALSE IMPRISONMENT.

It is false imprisonment in an officer to imprison the debtor, if sufficiency of personal estate is tendered to satisfy the execution and cost before commitment. Hall v. Hall, 120.

FENCE AND FENCES.

Where no division fence can be made upon the line, each proprietor must take care that his cattle do no damage to the other. Bissel v. Southworth, 269.

FORCIBLE ENTRY, ETC.

No damages are to be recovered in a prosecution *qui tam* upon the statute for a forcible entry, etc. Minor v. Knowles, 142.

FORFEITURES.

On a conviction for an offense against a statute, which enacts a fine and also a forfeiture of the utensils by which it was committed; the judgment ought to be for the utensils, and not for the value. Boles v. Lynde, 195.

FRAUD.

Fraud and imposition will render void a contract and sale. Ford v. Atwater, 58.

Same point adjudged in the case of, Reynolds et al. v. Bird et al., 305.

FRAUDULENT CONVEYANCES.

A general conveyance of all a man's interest, for the benefit of his creditors, is fraudulent as to the creditors who disagree to it. Bown's Executors v. Burrel, 252.

A deed may be fraudulent as to a creditor, who became such, subsequent to the giving of the deed. Mason v. Rogers, 324.

Fraudulent deeds are to be avoided by those, who are prejudiced by them. Barney v. Cutler et al., 489.

GAOLS AND GAOLERS.

If a prisoner escapes through the insufficiency of the gaol, the plaintiff will recover his special damages of the county. Staphorse v. County of New Haven, 126.

Same point adjudged in the case of, Hawley v. County of Litchfield, 155.

Same point adjudged in case of, Dennie v. County of Middlesex, 278.

Same point adjudged in case of, Murray v. Bishop et al., 357; Smith v. Same, 357.

A county is liable for the escape of a prisoner through the insufficiency of the gaol, unless an adequate remedy against some other person is shown. Dutton v. County of Litchfield, 450.

Same point. Dutton v. County of Litchfield, 505.

GARNISHEE.

Upon a *scire facias* the garnishee may give in evidence what his principal has confessed, to disprove his being in debt to him. Dewit v. Baldwin, 138.

An issue in fact being joined, may be tried by the jury, and the plaintiff may introduce other evidence besides the testimony of the garnishee, upon the trial. Ib.

A garnishee must appear in court and testify, if required, upon the *scire facias*. Byard v. Stewart, 149.

A garnishee may be inquired of respecting a mistake in the note claimed of him, and is liable for a debt due from him to the absconding debtor by assignment from others. Apthorp v. Lockwood, 198.

A garnishee may avail himself of his principal's not being an absconding debtor, upon a *scire facias*. Hubbard v. Brown, 276.

Lands taken and indorsed upon an execution, discharges the garnishee of so much, although they finally prove not to be the property of the absconding debtor. Fowler v. Spelman, 295.

A garnishee may plead that his principal was not an absconding debtor, and have it tried by a jury. Ib.

Several garnishees may not be joined in a *scire facias*. Boardman et al. v. Stewart, 473.

A fraudulent conveyance to a third person, of goods in the hands of a garnishee, will not protect him against *bona fide* creditors. Kelsey v. Wright et ux., 83.

A garnishee may testify upon the *scire facias* against him, although the plaintiff doth not require it. Vaughn v. Sherwood, 507.

Money taken from the garnishee by a compulsory process ought to excuse him. Hooper v. Benson, 545.

A garnishee may take advantage upon the *scire facias* against him, of his principal's not being an absconding debtor when the copy was left in service, unless estopped by some act of his. Woodbridge v. Winthrop, 557.

GRAIN GROWING ON LAND.

Doth not pass by a gift of personal estate — and the executors may enter and cut it. Kinsman, executor, v. Kinsman, 180.

GRANTS.

A grant of a greater estate than the grantor hath, will convey what he hath. Martin et ux. v. Sterling, 210.

Long practice and usage by the grantees, will construe and restrain the general terms in an ancient grant, in favor of purchasers. Barret v. Hosmer, 271.

Same point adjudged in the case of, Davidson v. Fowler, 358.

A grant of the privilege of the water in a stream, except what shall be wanted for a particular use, will be enlarged by an extinguishment of the particular use. Rowe v. Stoddard et al., 447.

A deed of 110 acres of land lying within certain lines and boundaries, particularly described — the covenant of seisin in the deed, is construed to extend to the land lying within the lines and bounds described. Snow v. Chapman, 528.

GUARDIAN TO MINORS.

Not liable to be sued by his ward, while under age, unless he has been called upon by the judge of probate and has refused to account. Robertson v. Robertson, 51.

HABEAS CORPUS.

Service in the army three years or during the late war, amounts to a manumission, upon which the court will discharge the servant upon a *habeas corpus*. Arabus v. Ivers, 92.

HEARING IN DAMAGES.

On a hearing in damages upon a note, the court cannot make an offset of a sum claimed to be due from the plaintiff, by another agreement. Phillips v. Halsey, 194.

Same point. Branch v. Riley, 541.

On a bond given to the sheriff to indemnify against the default of a deputy — forty shillings was allowed in damages for each action brought against the sheriff for the deputy's default. Fitch, sheriff, v. Jones et al., 248.

HEIRS.

The heirs of a deceased co-obligor are liable in equity to pay a debt of their ancestor, where the surviving obligor is bankrupt. Winslow v. The Heirs of Parkhurst, 268.

HOUSE.

A man's house may be broken open upon a criminal prosecution. Kelsey v. Wright et ux., 83.

Same point adjudged in the case of, The State v. Shaw et al., 134.

INDEBITATUS ASSUMPSIT.

Lies to recover back money paid upon an illegal consideration. Carey v. Prentice, 91.

*Indebitatus assumpsit* doth not lie upon a judgment. Vail v. Mumford, 142.

A special *indebitatus assumpsit* lies for a mistake in a settlement. Sage v. Alsop, 148.

This action doth not lie for money, recovered in an action at law, upon an accord, which might have been plead in bar of the action. Brunson v. Bacon, 210.

This action lies against an officer for money received on an execution, notwithstanding the Statute of Limitations. Seley v. Slossen, 216.

*Indebitatus assumpsit* lies for rents and profits of land. Rogers v. Tracy, 233.

*Indebitatus assumpsit* doth not lie against an administrator in *propria persona*, for a debt of the intestate. Aplin v. Robertson, administrator, 235.

This action will not lie against a person, who has received money and paid it over according to his duty. Bingham v. Tulley, 237.

This action does not lie to recover money paid on a judgment on the ground that the judgment was wrong. Burbanks v. Lee, 262.

*Indebitatus assumpsit* doth not lie, to recover money paid on a mortgage, before a decree of foreclosure. Fitch v. Colt et al., executors, 266.

This action will not lie where there is a written agreement. Carew v. Bond, 269.

This action does not lie in favor of a partner in trade against his copartners upon an unliquidated account. Dewit v. Staniford, 270.

This action doth not lie in favor of a surety upon a liability only, without an actual damnification. Brintnal v. Helms et al., 291.

This action doth not lie where there is a written security. Executor of George White v. Woodruff et al., 309.

It is not necessary to aver in the declaration of whom the money was received. Lawrence v. Clark, 348.

Mention being made in the declaration of whom the money was received, does not vitiate it. Hurd v. Hall, 372.

*Indebitatus assumpsit* doth not lie for the principal sum lent upon a usurious contract, after the security taken for it has been avoided. Cowles v. Hart et al., 396.

In a general action of *indebitatus assumpsit*, mistakes in a settlement may not be given in evidence. State v. Lawrence, 397.

A special action of *indebitatus assumpsit* lies for public securities which were pawned. Whiting v. M'Donald, 444.

*Assumpsit* will not lie for a sum which a person is doomed to pay. Rogers v. Henry, 470.

INFORMATIONS.

An information by a common person for an assault and breach of the peace, without joining the state is no more than a civil suit. Clark et al. v. Turner, 200.

Information against two for a joint offense, each may plead severally and one be tried by the court and the other by the jury. State v. Taylor et al., 226.

An information upon the statute against night-walking, must charge the person and the facts directly. Larabee et al. v. Tracy, 273.

Same point adjudged. Hotchkish v. Tuttle, 438.

A conviction before a justice for theft no bar to an information for a robbery. State v. Farrand, 446.

INSANE PERSONS.

A person insane, is to have a conservator appointed by the county court. Petition of Ruth Butler, by her overseer, 426.

INSIMUL COMPUTASSENT.

In an action upon an *insimul computassent*, the defendant cannot avail himself of mistakes in the settlement. Cogswell, executor, v. Whittlesey et al., 384.

INSURANCE.

An intentional deviation will not excuse the underwriters. Thompson et al. v. Alsop, 64.

INTEREST.

Interest allowed upon a *scire facias* against an administrator by special agreement. Starr, administrator, v. Henshaw, administrator, 242.

Interest not allowed on a book debt contracted in New York. Temple v. Belding, 314.

Interest for the delay of the debt by an *audita querela*, is not recoverable on the bond. Smith v. Canfield, 372.

Interest allowed on a note not expressed to be on interest. Dyer v. Elderkin, 412.

Interest allowed on an administration bond. Huntington, judge of probate, v. Mott, 423.

ISSUE.

Where two issues are joined in a cause they must be answered. Scot v. Turner, 163.

The facts put in issue must be directly answered. Smith v. Bellamy, 200.

The question put in issue to the court or jury must be directly answered. Gates et al. v. Nobles, 344.

Same point. Cook v. Atwater, 435.

An issue, which contains substance though informal, is good after verdict. Curtice v. Beardsley et al., 441.

The issue joined and put to the court or jury must be directly answered. Woodworth v. Clark, 542.

JOINT-TENANTS.

The doctrine of survivorship among joint-tenants exploded. Phelps v. Jepson, 48.

JUDGMENTS.

A judgment entered up by a justice by the confession of the party upon a note, given to abide an award of arbitrators is void. Curtice v. Scovel, 327.

Same point. Curtice v. Bulkley, 329.

Judgment will be given for the plaintiff notwithstanding there is a verdict for the defendant, if upon the whole record he is entitled to it. Fitch, sheriff, v. Scot et al., 351.

A judgment upon default against a defendant out of the state, must be, that execution issue upon the plaintiff's giving bond according to the statute. Strong v. Meacham, 391.

An action of debt lies on a judgment rendered in another state; notwithstanding the plaintiff might have taken his remedy against the bail there. Abbot v. Knight, 405.

A judgment must be either upon an issue found, a demurrer, a default, or upon *nihil dicit*. Boardman et al. v. Stewart, 473.

JURISDICTION.

The jurisdiction of a single minister of justice is restricted to £40 in criminal matters. Scot v. Turner, 163.

The jurisdiction of justices in civil actions, is limited to the towns in which they dwell. Palmer v. Palmer, 202.

Same point adjudged in the case of, Scovel v. Smith, 300.

Same point. Allen v. Vining, 313.

Same point. Abbey v. Cargel, 403.

A theft laid to have been committed in another state is not within the jurisdiction of the courts of this state. Gilbert v. Steadman, 403.

Property secured by a foreign attachment will give the court jurisdiction. Osborn v. Lloyd, 447.

LAND.

The fee of the land, left for highways is in the proprietors. Buel v. Clark, 49.

Fifteen years' adverse possession makes a title, and may be given in evidence under the plea of not guilty. Trowbridge v. Royce, 50.

A fifteen years' adverse possession makes a title. Lane v. Coply, 68.

Land purchased by the testator subsequent to making his will, will pass by it, in case of a republication. Luce v. Dimock, 82.

The fee of land left for highway is in the proprietors. Brown v. Freeman, 118.

Title to land may be acquired by a fifteen years' adverse possession, though not inclosed by a fence. Smith v. Isaacs, 151.

Same point. Miller v. Dow, 412.

Appraisers of land on execution must be freeholders of the town in which the land lies. Chapman v. Griffin, 196.

LEASES.

A writing giving liberty for a valuable consideration, to flow lands, for a number of years, is a lease, within the statute, and must be recorded. Smith v. Simons, 318.

A lease to a man for his life, and the life of his wife, in case he shall marry, vests no interest in the wife he marries. Remington v. Remington, 463.

LEGACY.

Payment of a legacy given by will is no satisfaction of a sum secured by a note. Smith, executor, v. Marshal et ux., 159.

A legacy given to be put to interest under the care of a trustee, is recoverable at law, although the trustee never accepted of the trust. Lamb v. Sharp et ux., 419.

LIMITATION OF ACTIONS.

The time of the war, not to be reckoned by the Statute of Limitation, is, from the 19th of April, A. D. 1775, to the 3d of April, A. D. 1783. Fuller v. Hancock, 238.

Indorsements on a bond do not save it out of the statute. Ib.

LOAN OFFICER.

Loan officer not liable to a foreign attachment. Spalding v. Imlay, 551.

MINORS.

A minor is no more liable in chancery for a fraud in a contract, than at law. Geer v. Hovy, 179.

Minors not liable for a fraud in contracts. Brown v. Dunham, 272.

A minor has right at any time during his minority to take an appeal from a decree of the court of probate. Davidson's appeal, 275.

MONEY.

Money in the hands of an officer, received and indorsed on an execution, is not liable to be levied upon and taken by execution against the original creditor. Willes v. Pitkin, 47.

Money received upon an assigned debt is the property of the assignee. Ib.

Same point adjudged. Redfield v. Hillhouse, 63.

Money for the support of prisoners is to be lodged with the gaoler. Parsons, sheriff, v. Whetmore, 117.

Money due on an assigned debt is the property of the assignee. St. John v. Smith, 156.

Money may be levied upon and taken by execution. Brooks v. Thompson, 216.

Money due on an assigned note is the property of the assignee. Fobs v. Brewster, 234.

Money in the hands of an attorney or officer, not liable to be attached. Geary v. Shepard, 544.

MORTGAGES.

A mortgage deed by which more than lawful interest is secured, is void. Deming v. Bristol, 171.

A mortgagor may not be allowed to avoid his mortgage by alleging that it is fraudulent as to creditors. Stores v. Snow, 181.

If the mortgagee take possession of the mortgaged premises, and foreclose the equity of redemption — the debt is discharged. M'Ewen v. Welles, administratrix, 202.

A mortgagor is tenant at will to the mortgagee. Beach v. Royce, 244.

Same point adjudged in case of, Beacher v. Cook et al., 296.

The interest in a mortgage accompanies the debt for which it was given as a collateral security. Lawrence v. Knapp et al., 248.

Where the condition of a mortgage is to indemnify the mortgagee against his being surety for the mortgagor, and a sum certain is mentioned, be the debts more or less the mortgagor is holden for all the debts be they more or less. Orr v. Hancock, 265.

A mortgage taken in this state for 7 per cent. to indemnify against an obligation given in New York, for 7 per cent. is not usurious. Nichols v. Cosset, 294.

If a mortgage is made defeasible by paying the money on demand, the estate becomes absolute in the mortgagee, at law, upon the death of the mortgagor, if the money is not paid. Alsop v. Hall, 346.

By a mortgagee's accepting from the mortgagor, a release of his equity of redemption in satisfaction of the debt, a promise to pay the interest of the debt is also satisfied. Davis v. Geary et al., 410.

A creditor's taking a mortgaged estate for a debt, due from the mortgagee doth not alter the right or duty of the mortgagor. Rowe v. Couch, 452.

A recovery against the mortgagor will not affect the title of the mortgagee. A private defeasance to an absolute deed on record, is fraudulent as to creditors and purchasers. Hough v. Ives, 492.

Altering the security of the debt doth not discharge the lien upon the land by the mortgage. Franklin v. Cannon, 500.

MOTHERS.

A mother, as such, is not entitled to an action for the services of a minor son — much less, when it doth not appear but that she is a *feme covert*. Burk v. Phips, 487.

NEW TRIAL.

A new trial cannot be granted in a *qui tam* prosecution as to the civil part only. Hannaball v. Spalding, 86.

In a petition for a new trial the new witnesses are to be named. Hillyard v. Seamons, 89.

The court will grant a new trial in favor of a plaintiff in a prosecution for a penalty, if the acquittal was unfairly procured. Prudden v. Northrup, 93.

New trial granted on the ground of new evidence, in an information for passing counterfeit money. Scott v. State, 155.

A witness at the trial, is a new witness as to what has come to his knowledge since. Foster v. Hough, 173.

New trial granted on the ground of a material witness being so disconcerted that he was unable to recollect his testimony at the trial. Ainsworth v. Sessions, 175.

The granting of a new trial vacates the judgment. Fleming, co-executor of M'Donald, v. Lord, sheriff, 214.

A petition for a new trial must be brought in the county where the cause was tried. Adams v. Kellogg, 255.

In a petition for a new trial, for mispleading, on the ground that the plaintiff ought to have traversed the defendant's plea instead of demurring to it, it is sufficient to allege that the plea was not true and that the defendant could not prove it. Corsa et al. v. Nichols, 313.

A new trial granted before judgment entered upon a verdict in a criminal prosecution for counterfeiting money, the cause continued and the prisoner let to bail. Peck v. State, 331.

A petition for a new trial, on which the duty was not paid is void. Hurd v. Hull, 505.

NOTES.

Indorsements in continental money upon notes given after the scale was adopted, are to be applied nominally. Marsh v. Deming, 85.

A note delivered immediately to the promisee, cannot be an escrow. Badcock v. Steadman, 87.

A note given for a consideration that is against law, may be avoided. Ketchum v. Scribner, 95.

A note given Saturday night not void by the statute. Carpenter v. Crane, 98.

Same point. Mumford v. Buel, 145.

An arbitration note for £10 and vouched by two witnesses, is not cognizable before a justice of the peace. Mills v. Borroughs, 99.

Same point adjudged in the case of Desborough v. Desborough, 126.

A note given since the late war and before the statute respecting absentees, for a debt contracted before the war, is within the equity of the statute. Borland v. Sharp, 178.

A note for money payable in collateral articles, may be discharged, by paying or tendering the money. Sessions v. Ainsworth, 181.

A note given to the heirs of a person, who is alive, is a sufficient description for them to take by. Bacon v. Fitch, 181.

A note for specific articles payable on demand, must be specially demanded. Dean v. Woodbridge, 191.

A note for money only, which hath two subscribing witnesses, if one is dead or become interested, is appealable. Barker v. Colt, executor, 223.

Same point. Fitch v. Ripley, 316.

A note for West India rum, sugar, etc., not evidence of a note for West India goods generally. Brewster v. Dana, 266.

Notes given for land, upon a contract, and a bond taken to convey the land when the notes are paid, are good and binding. Bacon v. Porter, 370.

By reversing an erroneous judgment upon a note, the note is revived. Curtice v. Scovil, 421.

A note executed on the Sabbath day is void. Wight v. Geer, 474.

A note given by a minor is made valid by his agreeing, after he is of full age, to pay it. Lawrence v. Gardner, 477.

A note for £55 lawful money, to be paid in one shilling orders at their value in May, 1785, is a note for £55 lawful money. Hall v. ——, 493.

A note for money, with a condition that if the promisor give a deed of certain lands, said note to be void, is a note for so much money voidable only by giving the deed. Lockwood, administrator, v. Smith, 497.

*Non est factum* is a good plea in an action upon a note. Ives v. D'Wolf, 503.

If A. recommends B. to C. and C. thereupon trusts B. and takes his note payable at a certain time, and A. takes B.'s note for the same sum payable one month after, conditioned to be void in case B. pays C. and indemnifies A. If B. fails to pay C. he will be liable on his note to A., although A. has not paid the debt. Filly v. Brace, 507.

Where an assignment of a note contains a promise it shall be paid when it becomes due, an action lies against the assignor when the note becomes due if it is not paid. Perkins v. Perkins, 541.

NOTICE.

Upon a complaint against the owner of a copyright, for not vending a sufficient number of the books — twelve days' notice is to be given. Patten v. Goodwin, 172.

NUISANCE.

License from the town to erect a mill-dam, no justification in an action for a private nuisance. Nichols v. Pixley, 129.

Where a common nuisance is a particular injury to any one, he may have an action for it. Burrows v. Pixly, 362.

A man may use the waters of a stream running through his land for necessary and useful purposes. Perkins v. Dow, 535.

OFFICERS.

An officer's return upon an execution ought to be such as will justify him. Grant v. Shaw, 526.

OFFSET.

In an action brought by an administrator of an insolvent estate on note, against a creditor by book, the court will offset the book debt found by the commissioners upon the note. Hosmer, administrator, v. Merriam, 427.

OYER.

It is no excuse upon a motion for oyer, that the writing is lost — but the excuse must be set out in the declaration or plea. Branch v. Riley, 541.

PARTITION.

In a writ of partition the plaintiff must set forth his right or proportion. Coply v. Crane, 69.

Same point adjudged. Champion v. Spencer, 147.

PAYMENT.

Money extorted by a creditor from his debtor, by an unlawful execution, will be considered as a payment of the debt. Lord, administrator, v. Waterhouse et al., executors, 430.

PENALTY.

Where a penalty for continuing a nuisance, is a gross sum per week, one only may be sued for at a time. Chapman v. Chapman, 52.

The court will not chancer the penalty of a bond which is prescribed by a statute. Treasurer v. Patten, 260.

A second offense which incurs an accumulated penalty must be of the same nature of the first, and after a legal conviction. Scot v. Turner, 163.

PLEAS AND PLEADINGS.

A defendant who has missed his plea may have liberty to alter it while the case is on trial. Kisham et al., executors, v. Nichols, 75.

Omitting a traverse where it is necessary, will be fatal upon a demurrer. Corsa et al. v. Nichols, 217.

Where new matter is replied, or the traverse goes only to part of the allegations in a plea, it ought to conclude with a verification. Baily v. Smith, 243.

A defendant may not depart from his plea of title put in before the justice in an action of trespass. Matson v. Meach, 344.

In a reply to a plea, of no award, plead to an action on an arbitration note, it is necessary to set forth not only the award but also a breach. Gillet v. Bristow, 355.

Duplicity may be taken advantage of by a special demurrer, only; a general demurrer may not be altered to a special demurrer. Smith v. Northrup, 387.

Upon the plea of *nonassumpsit* to a note, the defendant may not give in evidence that he has paid it. Ripley v. Fitch, 404.

A defendant may have liberty to alter his plea, when the cause is on trial. Ib.

A party will not be allowed to alter his plea, where it will not be relevant to his case. Mott v. Downer, 425.

Liberty given to alter the pleadings when the cause is on trial. Benedict et al., administrators, v. Nichols, 434.

A plea may be altered, with leave of the court, after the cause is committed to the court for judgment. Hough v. Tracy, 476.

A traverse of the plaintiff's title, in an action of trespass amounts to the general issue. Abel v. Abel, 549.

POOR.

Daughters' husbands not liable for the support of their wives' parents, when poor and impotent. Sherman v. Nichols, 250.

Same point adjudged. Nichols v. Sherman et al., 361.

POSSESSION.

The possession of tenant for life, and those under him although they may claim a greater estate than he hath, will not defeat the right of the remainderman. Chandler v. Phillips, 546.

PROBATE COURT.

The court of probate may lengthen out the power of commissioners on an insolvent estate, provided it doth not exceed eighteen months. Webb v. Fitch et al., administrators, 177.

An account of expenses incurred, by selling lands belonging to an insolvent estate, and lying in another jurisdiction, must be settled by the court of the jurisdiction in which the land lies. Hubbard et al. v. Hinkley, executor, 413.

PUBLIC SECURITIES.

If payable on demand, they are to be estimated according to their value when received. Collins v. Hubbard, 354.

Same point adjudged. Atwater v. Carrington, and Treat v. Carrington, 357.

The value of public securities to be estimated at the time when payable. Storer v. Prentice, 425.

Payable on demand, estimated at the time of receiving. Curtice v. Whipo, 445.

Where the securities are to be paid on demand or to be returned on demand the rule is the same. Babbet v. Belding, 445.

Public securities are to be valued at the time when payable, and payments at the time when made. Hobert v. Kimberly, 491.

If payable on demand, are to be valued at the time when received. Day v. Leavensworth, 519.

PURCHASERS.

A purchaser from a mortgagor for a valuable consideration and without notice, is quieted in his title, by the mortgagor's satisfying the debt out of the residue of the mortgaged premises, against the mortgagee or any claiming under him. Sebor et al. v. Robbins et al., 460.

A purchaser, from an administrator under liberty from the assembly to sell land to pay debts, shall hold the land, against a voluntary conveyance made by the intestate. Manwarring v. Dishon, 478.

A purchaser under a collector, may not enter until the year is expired. Holabert v. Blakely, 505.

RECEIPTSMEN.

A receiptsman of property taken upon an execution is liable to the officer although the execution be otherwise satisfied or discharged. Reed v. Tousley, 374.

RECORDS.

No averments may be made against a record. Butler v. Butler, 275.

REPLEVIN.

The plaintiff's bond in a replevin, is in consideration of law, no security. Smith v. Trawl, 165.

A bond on a replevin must respond the damages. Webster v. Price, 56.

Same point adjudged in the case of, Buel v. Deavenport, 261.

RIVERS.

The bed and waters of Connecticut river are common to all the citizens. Pitkin v. Olmstead, 217.

A right of taking fish in certain places in the river, is acquired by labor and expense in clearing them, and a continued occupation. Ib.

SCIRE FACIAS.

A defendant cannot plead to a *scire facias*, what might have been plead to the original action. Green v. Dewit, executor, 183.

Two plaintiffs in several attachments cannot join in a *scire facias*, upon a bail bond. Gridley et al. v. Starr, 281.

Nothing may be taken advantage of upon a *scire facias* which might have been plead to the original action. Robbins v. Bacon, 548.

SELECTMEN.

Selectmen are liable to respond in damages, for appointing an overseer, in an illegal and oppressive manner. Johnson v. Selectmen of Wallingsford et al., 245.

SETTLEMENT IN TOWNS.

A ward has right to reside with his guardian, and such residence gains no settlement. Town of Salisbury v. Town of Fairfield, 131.

A bastard child is settled with the mother. Town of Canaan v. Town of Salisbury, 155.

A person who would have been settled in a new town had he been at home when it was formed, is notwithstanding settled there. Town of Mansfield v. Town of Granby, 179.

An idiot is settled with the parents. Town of East Hartford v. Town of Middletown, 196.

A settlement in a town may be suspended but not lost until another is gained. Norwich v. Windham, 232.

A foreigner gains no settlement by commorancy. Somers v. Barkhempstead, 398.

Citizens of any of the United States are not considered as foreigners, but as having a settlement in the state to which they belong. Windham v. Norwich, 408.

Residing in a town more than a year under certain circumstances, will not gain a settlement. Town of Lisbon v. Town of Franklin, 423.

A certificated person will gain a settlement by commorancy in the town he removes to, unless his certificate is duly lodged. Tolland v. Lebanon, 398.

SHERIFF.

A sheriff may be sued out of his county for a neglect of duty in not levying an execution and before a different court from that which granted the execution. Huntington v. Lothrop, 90.

The sheriff hath no right to take a bond of a prisoner, that he will abide in prison until he pays for his board. Lord, sheriff, v. Parmele, 158.

Will not be liable for goods attached, if returned to the debtor, after sixty days from rendering the judgment, if not demanded within that time. Parsons v. Phillips et al., 481.

SLANDER.

In an action for words, evidence that there was such a report before the defendant spoke the words, not admissible. Lewis v. Niles, 346.

The general character of the plaintiff may be inquired of with respect to the crime charged by the words. Brunson v. Lynde, 354.

Same point. Seymour v. Merrills, 459.

SOLDIERS.

Who enlisted into the army by the procurement of two men, are entitled to the premiums given by the public. Rockwell et al. v. Foster, 529.

STATE ATTORNEYS.

A state's attorney is an informing officer within the meaning of the law. Fowler v. Bishop, county treasurer, 198.

STEEPLES.

The law doth not require a vote by two-thirds of the voters in an ecclesiastical society, to build a steeple to a meeting-house. Kingsbury v. Selectmen of Tolland, 533.

SUBMISSION TO ARBITRATION.

A submission by rule of court is revocable by the parties. Belton v. Halsey, 221.

A submission to the award of arbitrators, necessarily implies an obligation to perform it. Bundy v. Sabin et al., 411.

TAXES.

An estate in land less than a fee is liable to be taken for taxes — but it must be taken in a reasonable manner. Holabert v. Blakely, 505.

TENANTS IN COMMON.

May join in an action for their common estate. The nonsuit of some of the plaintiffs no bar to the others' proceeding. The defendants acquiring a right from some of the plaintiffs pending the suit, will not purge the original wrong and disseisin, as to the residue of the premises. And the plaintiffs shall recover according to the right they prove they have in the premises. Hillhouse et al v. Mix, 246.

TENDER.

In a plea of tender of goods upon an obligation, they must be particularly described, so that they may be known. Nichols et al. v. Whiting, 443.

THEFT.

A thief may be taken and prosecuted in any jurisdiction where he carries the goods stolen. Rex v. Peas, 69.

TOWNS.

Not liable for the default of their constables in the execution of their office. Hurlbert v. Marsh et al., 520.

TRESPASS.

A man's finding bees in a tree standing on another man's land, gives him no right to either. Merrils v. Goodwin, 209.

The commanding officers of companies will be liable in certain cases for trespasses committed by the soldiers under their command. Avery v. Bulkley et al., 275.

An action of trespass lies in favor of a tenant by the curtesy. Clark v. Welton, 299.

TROVER.

Trover lies for property tendered upon an obligation, in favor of the obligee. Rix v. Strong, 55.

Trover lies in favor of a promisee against the promissor for a note which was got up by means of the fraud of a third person, without being paid. Netleton v. Riggs, 125.

If the effect of the suit is to recover the thing demanded, the plaintiff shall have full cost, although the verdict is for less than forty shillings. Brick et al. v. Reed, 136.

Public securities having been delivered upon a forged order, no bar to the right owner's recovering them in this action. Griswold v. Judd, 221.

An action of trover is not barred by Statute of Limitation although an action of trespass, which would have lain for the same thing, would be. Ferress v. Ferress, 365.

Trover lies by an administrator for goods taken and converted in the life of the intestate. Kirby, administrator, v. Clark, 389.

USURY.

A note fairly taken will not be made void, as usurious, by afterwards receiving more than lawful interest upon it. Hovey v. Shumway, 70.

A sum in lawful money secured, for the loan of final settlement notes over and above the lawful interest for said final settlement notes is usury. Fitch v. Hamlin, 110.

Extortion, fraud or duress not usury to be relieved against by filing a bill on the statute. Ely v. Stow, 115.

A bill of usury must be filed on the second day of the court to which the action is brought. A defendant not admissible as a witness to prove his bill. Fleming, executor, v. Bates, 129.

Same point adjudged in the case of Livingston v. Bird, 255.

If a sum is included in an obligation above the principal and interest by mistake, it is not usury. Ib.

A defendant may not be a witness to prove his bill of usury. Payne v. Payne, 367.

A contract to return certain public securities by a certain time, or to pay a certain sum in lawful money, less than the amount, at the option of the promisor, is not usurious. Where the facts in a plea do not amount to usury, no averments can make it so. Where the parties have stipulated the sum to be given by their contract, there is no room for a hearing in damages, unless payments have been made. Wadsworth et al. v. Champion, 393.

A note for a sum in final settlement notes and the lawful interest in silver and gold not usurious. Patten v. Thompson, 526.

VERDICT.

A verdict set aside, because a juryman conversed freely to a person not of the jury, about the cause under consideration. A juryman who is accused of having conducted improperly cannot be a witness on that question. Dana v. Roberts, 134.

The court will not set aside a verdict because the jury have found it without sufficient evidence. Smith v. Bradley, 150.

If the jury refer the decision of a cause, or the assessment of the damages to chance, the verdict will be set aside. Warner v. Robertson, 194.

A verdict that does not answer the issue is bad. Kegwin v. Campbell et al., 268.

A verdict will not aid the want of consideration in the declaration in an action of *assumpsit*. Hitchcock et al. v. Page, 293.

Every reasonable construction is to be adopted in support of a verdict. Huntington v. Ripley et al., 321.

On a conviction for theft the verdict must find the value of the goods stolen. Gilbert v. Steadman, 403.

If any of the jury converse with other people not of the jury, about the cause under consideration, the verdict will be set aside. Bow v. Parsons, sheriff, 429.

If a juryman gives evidence to his fellows, not given in court, in a cause under consideration, the verdict will be set aside. Talmadge et al. v. Northrop, 522.

WASTE.

Action of waste lies against tenant in dower. Crocker v. Fox et ux., 323.

This action lies against a tenant by the curtesy. Rose et al. v. Hays, 244.

WILLS.

In the construction of a will the intent of the testator is to govern, if it be consistent with the policy of the law. Holmes v. Williams et al., 332.

A gift of houses and lands, by a will to another, passes the fee, if the testator hath a fee in them. Ib.

These words in a will, and in case my grandson William dies without issue lawfully begotten of his body, then I give said houses, land, etc. to my sons in law — must be construed to mean a dying without leaving issue at the time of his death. Ib.

The judge of probate is a legal witness to a will. M'Lean et ux. v. Barnard, executor, 462.

WITNESSES.

Witnesses must testify what the party voluntarily communicated to them in confidence, except attorneys and counselors in their client's cause. Mills v. Griswold, 383.

Same point. Sherman v. Sherman, 486.

A witness who is discharged of his interest is to be admitted. Humes v. Day, 466.

A defendant against whom there is no evidence, may be improved as a witness. Burney v. Cutler et al., 489.

An executor may be a witness to a will. Hawley v. Brown, 494.

If a party interrogates a witness respecting his interest, upon the witness's oath, he is concluded by it. Mallet v. Mallet, 501.

A witness's saying that he would swear to anything if he could get six shillings by it, goes to his credit. Newhal v. Wadham, 504.

WRITS.

What the law enjoins to be done need not be inserted in the writ. Smith v. Bradley, 148.

A writ dated the 20th of October, A. D. 1789, to be answered on the 30th of October next, is October come twelve month. Austin v. Nichols, 199.

A writ which has been served and returned, may not be taken from the files, to answer another purpose. Towner v. Phelps, 250.

Where it is necessary a writ should be directed to an indifferent person, the authority signing it is to do it. Thatcher v. Heacock et al., 284.

A writ dated the 15th of December, A. D. 1791, to be answered on the 13th of December next, it is December, A. D. 1792. Way v. Clark, 439.

A writ directed to an indifferent person by name without describing his place of abode, is good. Johnson v. Hills, 504.

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